

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 701.

**BOARD OF TRADE OF THE CITY OF CHICAGO, JOHN HILL,
JR., REUBEN G. CHANDLER, ET AL., APPELLANTS,**

vs.

**CHARLES F. CLYNE, UNITED STATES DISTRICT ATTOR-
NEY FOR THE NORTHERN DISTRICT OF ILLINOIS;
HENRY C. WALLACE, SECRETARY OF AGRICULTURE,
AND ARTHUR C. LUEDER, UNITED STATES POST-
MASTER AT THE CITY OF CHICAGO.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.**

FILED NOVEMBER 20, 1922.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois, on Friday, the seventeenth day of November, in the year of our Lord one thousand nine hundred and twenty-two, being one of the days of the regular November term of said court, begun Monday, the sixth day of November, and of our Independence the 147th year.

Present:

Honorable George A. Carpenter, District Judge.
Robert R. Levy, U. S. Marshal.
John H. R. Jamar, Clerk.

2 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 3046.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

Be it remembered that heretofore, to-wit: on the 30th day of October, 1922, came the above named complainants, by their solicitors, and filed *its* Bill of Complaint, as follows:

3 3046.

In the District Court of the United States, Northern District of Illinois, Eastern Division.

In Chancery.

3046.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

Bill of Complaint.

Robbins, Townley & Wild, Solicitors for Complainants.
Henry S. Robbins, Counsel.

(Endorsed:) Filed Oct. 30, 1922. John H. R. Jamar, Clerk.

4 & 5 In the District Court of the United States, Northern District of Illinois, Eastern Division.

In Chancery.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

To the Honorable the Judges of said Court in Chancery Sitting:

Your orators, The Board of Trade of the City of Chicago (hereinafter called the "Exchange") and John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord, hereinafter called the "co-complainants," (who join with said Exchange in bringing this bill in their own behalf and in behalf of all other members of said Exchange who may wish to join therein or share in the relief granted herein) bring this bill of complaint against Charles F. Clyne, as, and who is, United States District Attorney for the Northern District of Illinois, Henry C. Wallace as, and who is, Secretary of Agriculture of the United States, and Arthur C. Lueder, as, and who is, United States Postmaster at the City of Chicago, and allege:

6 1. That said Exchange is a corporation organized under a special charter granted by the State of Illinois, February 18, 1859, by which certain persons before that date residing in the City of Chicago and engaged there in the purchase and sale of grain were created a corporation, and were given power to admit such persons as members and expel such members as said corporation might see fit, and also power to adopt and maintain such rules, regulations and by-laws as said corporation might think proper for the management of the business of its members and the mode in which it should be transacted; and said corporation was also authorized to appoint committees of arbitration for the settlement of such matters of difference as might be submitted by members of said Exchange or others; and said charter also provided that any award in such arbitration, when filed in any Circuit Court of said state, should have the force and effect of a judgment, upon which an execution might issue as upon other judgments; and by said charter said corporation was also given power to appoint such persons as they may see fit to examine, measure, weigh, gauge, or inspect flour, grain and other articles of produce or traffic commonly dealt in by the members of said corporation, and the certificate of such appointee as to quality or quantity of any such article, or its brand or mark was made evidence between any buyer and seller assenting to the employment of such appointee, a copy of which charter is hereto attached and made a part hereof as Exhibit "A."

2. That upon the granting of said charter said grantees thereof adopted and declared the objects of said Exchange to be:

"To maintain a Commercial Exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information; and, generally, to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits,"

and to accomplish these objects the members of said Exchange adopted, and have for many years maintained certain regulations governing the inspection of flour, grain, provisions, hay, the cutting and packing of hog products, the grading and inspection of flaxseed, the regulation of grain warehouses, whose receipts shall be made regular for delivery on grain contracts, the sampling of grain, the storage of provisions, the management of a clearing house maintained by said Exchange for the convenience of its members, a weighing of grain, the maintenance of a Custodian Department respecting commodities dealt in, the distribution of market records and reports, and other like matters. And the Exchange has adopted, and now maintains, a set of rules which provide for the admission and expulsion of members and govern the relations of its said members to said Exchange and to each other, and also the manner in which the business of its members should be transacted, which rules also vest (subject to said rules) the government of said Exchange and the management of its business and financial concerns in a board of eighteen directors, one of whom shall be president of said Exchange; and said rules further provide that said board of directors shall annually assess against each of its members an amount, which in the aggregate will be sufficient to meet all the expenditures of said Exchange. And other rules regulate the making by its members of contracts for future delivery of grain, one of which requires that such contracts must be made in the open market in its exchange hall during certain hours for regular trading, and others fix the grades of grain which shall be deliverable upon said future contracts and provide that the several different grades of grain shall be deliverable upon such contracts at a fixed premium or discount in price; and another of said rules provides that in case any property contracted for future delivery is not delivered at the maturity of the contract, a committee shall be appointed from the membership to determine as nearly as possible the true commercial value of the commodity in question on the day of the maturity of the contract, and that the price so established shall be the basis upon which settlements of such defaults shall be made, and making it the duty of the committee, in thus determining the true commercial value of the commodity, to ascertain its value in other established markets, or for manufacturing or consumptive purposes in this country, together with such facts as may justly enter into the determination of its value, and also providing that as liquidated damage the seller shall pay to the purchaser not less than one per

cent nor more than ten per cent of the value of the commodity as established by said committee, and further providing that in case any property contracted for future delivery is not received and paid for, it shall be the duty of the seller to establish his claim on the purchaser by selling said property on the market within twenty-four hours thereafter. And certain of its said rules, which are material in this controversy, are set out in Exhibit "B" attached to this bill and made a part thereof.

3. That among the rules so adopted and now in force are some providing that, whenever any member should default on a business contract or in the payment of any award made in any arbitration, or should be guilty of certain other misconduct, he should be suspended by the board of directors from all the privileges of membership, and that in case any member shall be guilty of certain other graver offenses, such as bad faith, or an attempt at extortion

9 or other dishonest conduct, he shall be expelled from the Exchange; but that written charges shall be filed with the board of directors specifying the offense charged, of which the member shall have notice and a hearing before such suspension or expulsion; and that one of said rules (see Section 1, Rule X in Exhibit B) provides that any male person of good character and credit may be admitted to membership by the board of directors upon approval by at least ten of its directors and upon payment of an initiation fee of twenty-five thousand dollars, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the Rules, Regulations and By-laws of the Exchange, and all amendments that may be made thereto, which agreement has been signed by all who have become members and reads as follows:

"We, the undersigned members of the Board of Trade of the City of Chicago, do, by our respective signatures and by virtue of our membership in said corporation, hereby mutually agree and covenant with each other and with the said corporation, that we will, in our actions and dealings with each other and with the said corporation, be in all respects governed by and respect the rules, regulations and by-laws of the said corporation as they now exist, or as they may be hereafter modified, altered or amended."

That said Exchange does not admit, and never has admitted, to membership any corporation; but one of its said rules provides that, if any two members of said Exchange are executive officers and bona fide and substantial stockholders of any corporation, it may become a party to such trades or contracts as are made in the exchange hall of said Exchange, but that in that event said two members shall be subject to be disciplined for any default in the execution of any such trade or contract of said corporation in the same manner as they are subject to be disciplined for failure to comply with

10 the terms of any business obligation of their own; and that said Exchange now has 1,600 members, and that all of the co-complainants are members in good standing of said Exchange.

4. That yearly since 1859 said Exchange has levied an assessment upon all its members more than sufficient, with the moneys received from its other incidental sources of revenue, to meet all its ordinary expenses, and with such surplus of its said revenue it has acquired, and now owns in fee, real estate in the business district of Chicago, upon which it has constructed a large building, which provides it with an exchange room and offices and also surplus space, from which said Exchange derives a substantial rental; and that the fair market value of such real estate and building, over and above a mortgage thereon, exceeds \$2,000,000, and that said Exchange now raises each year by assessments upon its members as aforesaid, more than \$240,000 for the purpose of maintaining itself and said building.

5. That the Exchange does not enter, and never has entered, into any commercial transactions of any kind whatever for profit; nor does it pay, or seek to pay, any dividends to its members; that its chief purpose and function is to provide an exchange room where its members may meet daily between certain market hours and make with each other contracts for the purchase and sale of grain and other products of the farm, and also to prescribe, and enforce, rules respecting the terms of such contracts and to enforce, by disciplinary proceedings when necessary, compliance by its members with their said contracts, and for the settlement of disputes arising between its members out of their trades, and that about the only other function of said Exchange is to determine who are fit persons, as respects character and financial responsibility, to be and remain its members.

11 That the Exchange does not deliver, and never has delivered, for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication, any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery; that it does cause to be collected each business day the first price and each change in price made in the contracts for present and future delivery, which are entered into by its members in its exchange hall during its established market hours, and does cause said quotations to be delivered in the City of Chicago to certain telegraph companies who have agreed to pay, and do pay, said Exchange an agreed compensation therefor, and said prices and quotations so collected and delivered truthfully and accurately represent the course of such prices.

6. That as its main source of revenue is, and always has been, the annual dues paid by its members, it is incumbent upon the said Exchange to make it profitable for persons to become and remain members and pay such yearly assessments; and that, in order to render its disciplinary power over its members sufficiently effective to maintain a high character for business probity among its members, it is also necessary for said Exchange, not only to make it profitable for members to remain such, but also to give a substantial

salable value to such memberships; and that said Exchange seeks to accomplish, and accomplishes, this by

(1) limiting the number of its members as aforesaid;

(2) providing that only members may make transactions in its exchange room;

(3) prescribing, and compelling all its members to conform to, certain fixed reasonable minimum rates of commission, which members, when acting as agents, must charge their principals for making transactions in said exchange hall;

12 and that for this purpose said Exchange has for many years maintained (as do all commercial exchanges), and still maintains and enforces, a rule prescribing the minimum rates of commission (which are reasonable) as respects each of the different kinds of transactions, which each member is required to charge, whenever acting for a principal in any transaction in said exchange hall, but the rate to members is lower than the rate to non-members; and that one of the essential features of this rule is the following provision:

"Rule XIV. * * * F. Any member who, or whose firm or corporation, shall be convicted by the Board of Directors of a violation of the provisions of this rule, or of any evasion thereof by making rebates in prices, by making any contract or observing any contract already made, by furnishing a membership in this Exchange, by giving any bonus, gift, donation, or otherwise, or shall purchase or offer to purchase any grain, seeds, provisions or other commodities consigned to him, them, or it, for sale, or by rendering any other service or concession whatsoever, with the intent to evade in any way directly or indirectly the regular rates of commission or brokerage established by this rule, shall be expelled from this Association."

That the provision for the expulsion of any member violating its said commission rule was first inserted in said rule about the year 1900 and that before such insertion the salable value of its memberships did not exceed \$800, and that since such amendment and its strict enforcement by said Exchange, memberships have been sold to persons desiring to become members for as much as \$11,000 and are now salable for more than \$5,000.

7. That in recent years there have been organized in most of the grain-producing states many so-called farmers' co-operative societies, associations or corporations, and farmers' co-operative elevator companies, with the avowed purpose of enabling such farmers as
13 should become members thereof to market their crops at actual cost, and, if possible, to market their crops through the exchanges at actual cost, and without paying the commissions charged by members of such exchange, the method contemplated to attain this being to make one of the salaried officers of said co-

operative organization a member of the exchange, and through him to sell all the grain produced by members of the co-operative association—he temporarily charging the prescribed commissions—and ultimately rebating back to the members of such organization the aggregate of such commissions (after paying his salary and incidental expense) on the basis of the number of bushels of grain each producer has sold through said organization—such rebates being popularly called “Patronage dividends;” and that on April 18, 1921, there was organized under the laws of Delaware, a corporation known as “U. S. Grain Growers, Inc.,” membership in which is limited to producers of grain; and the promoters of said corporation publicly state that the general purpose of said corporation is the creation of a non-stock, non-profit agricultural organization, which can market at cost grain produced by its members, and which extends the so-called farmers’ co-operative movement farther than co-operative methods have thus far gone.

That the by-laws of such corporation provide for the organization of subsidiary corporations for the carrying out of said purposes, and that the operation of said corporation shall consist of the marketing of the grain of its members, by virtue of contracts with statewide or interstate growers’ associations, farmers’ co-operative elevator companies or with local co-operative associations; the purpose and object sought to be accomplished through said two contracts being

14 that the grain of all growers of grain who sign such contracts with any local elevator company shall, through the co-operation of said local elevator company and said U. S. Grain Growers, Inc., be sold at actual cost, and without the payment of any commissions to members of any of the grain exchanges of the country.

That heretofore members of said co-operative associations have sought (without, however, formal applications) to become members of said Exchange, but said Exchange has refused to admit any such persons to membership, for the reason that the avowed purpose of such applicants has been to rebate back to the members of their organization the aggregate amount of their commissions, less their salary and expenses, and that this would violate and break down said commission rule of said Exchange, and would ultimately destroy the business of such of its members, as consists in the receiving of grain by consignment for sale on commission—the ultimate effect of which would be to much impair, if not destroy, the value of the memberships of said Exchange, and make it difficult for said Exchange to maintain sufficient members who would be willing to pay assessments to meet the expenses of maintaining its said Exchange.

8. That the members of said Exchange engage only in the following different kinds of trading in grain:

(1) Many of them, including some of the co-complainants, act as commission merchants and receive from producers and country grain dealers grain in cars and boats consigned to them, which, as

agents, they sell for immediate delivery, and they account to their principals for the proceeds of such sales less their commissions and other expenses; and many of said members, including some of the co-complainants, acting either as agents or principals, purchase and sell grain in Chicago, which is in cars or elevators, for immediate delivery, all of such transactions being popularly known as "cash" trades.

(2) Many members of said Exchange, including some of the co-complainants, send out in the afternoons, whenever the market conditions are favorable, telegrams and letters to country grain dealers and others non-resident in Chicago, offering to buy grain at a certain named price and to be shipped within a certain named time, if the offer shall be accepted by telegram received by the offering member before the said market hours next morning, such transaction being known to the trade as "contracts to arrive" or "cash sales for deferred shipment;" many members, including some of the co-complainants, also send out, when market conditions are favorable, telegrams and letters to millers and others (non-residents in Chicago) on the consumer's side of the market offering to sell grain at a named price and subject to shipment within a named time, if such offers are accepted with a certain time, transactions of this kind being also known to the trade as "cash sales for deferred shipment."

(3) Many of said members, including some of the co-complainants, daily engage, either as principals or as agents, in the making in said exchange hall of contracts with other members of the Exchange for the purchase and sale of grain for future delivery, said contracts providing that the seller therein shall deliver in Chicago, the grain covered by the contract upon any day of the named month that he shall select. That more than 75 per cent of the volume of all the trading in said exchange hall consists of such trading for future delivery. Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large, that said Exchange has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a "pit," where its members may conveniently, and do daily, gather and make such future contracts with each other by open viva voce bidding; and respecting such trading the rules of said Exchange have for many years required, and now require, that all orders received by members to buy or sell for future delivery must be executed in the open market in its exchange room and only during the hours of regular trading; by reason whereof all such trading in grain for future delivery by members of said Exchange is in fact confined to said exchange room and said market hours; and both buyers and sellers in all said contracts are personally present in the City of Chicago when the contracts are made; and another rule of said Exchange requires that any offer to buy or sell for future delivery when made openly in the exchange room during the hours for regular trading, may be accepted by any other member of said Ex-

change, and that the contract shall be made with the member first accepting said offer.

That many of the members of said Exchange are bankers, officials of railroad and steamship corporations, packers, etc., who find it to their business advantage to be members of said Exchange, but who are not active members thereof; and many more of said members act only as agents and receive from others on consignment shipments of grain to be sold by them as agents, or who act only as agents or brokers of others in the making of future contracts with other members of said Exchange; that none of the members aforesaid makes as principal any of said contracts for future delivery; and that of those members and non-members who as principals do buy or sell grain for future delivery upon said Exchange for the purpose of profiting by the rise or fall of future prices, most of

17 them have not sufficient capital to make, and do not make, or have open at any one time, contracts for future delivery of other than small quantities of grain, and that only a small number of persons have sufficient capital to make, and do make, contracts for the future delivery of large quantities of grain, and a comparatively few of such speculators are members of said Exchange.

9. That all such contracts for future delivery contemplate and provide for the delivery of warehouse receipts instead of the grain, and only of such warehouse receipts as the rules of said Exchange make valid for delivery; that a rule of said Exchange now and for many years in force (see Rule XXI of Exhibit B), provides that only such warehouse receipts shall be deliverable upon contracts for future delivery as shall be issued by warehouses which have complied with the rules, regulations and requirements of said Exchange, and have been by the board of directors of the Exchange declared regular warehouses for the storage of grain; and none of the warehouses thus made regular are located outside of the State of Illinois; and said rules also make it the duty of such board of directors on the first of July in each year to designate the grain elevators or warehouses in Illinois whose receipt shall be deliverable between its members on their contracts for future delivery for the ensuing year; but said rule also provides that said board of directors may declare, as regular elevators, only such elevators or warehouses as have been licensed by the State of Illinois to conduct a public warehouse, pursuant to the provisions of a statute of that state entitled, "An Act to regulate public warehouses and the warehousing and inspection of grain and to give effect to Article XIII of the Constitution of this state," which said act provides that it shall be the duty of every warehouseman of Class "A" to receive

18 for storage any grain tendered him and to mix such grain with other grain of a similar grade received at the same time as near as may be, and such statute further provides that the warehouse receipt issued for such grain so received into said warehouse shall state on its face that the grain mentioned therein has been received into store, to be stored with other grain of the

same grade received about the same time as the date of said receipt; and by said act it is further provided that, when any holder of any such warehouse receipt shall demand the delivery of the grain therein mentioned, said proprietor shall deliver on said receipt such of the grain of that particular grade as was first received by him in store or which had been the longest time in store in his warehouse; and, while said statute provides that, with the consent of any depositor of grain and the proprietor of a warehouse, the particular grain of said depositor may be kept in a bin by itself, apart from that of other owners, and that such bin shall be marked and known as a "separate bin," and that the receipt therefor, shall so state and contain the number of such special bin, grain in Chicago is seldom, if ever, stored in a public warehouse of Class "A" in a special bin, and if so stored the warehouse receipts issued for such grain are not, and never have been, deliverable upon said contracts for future delivery made by members of said Exchange; nor has said Exchange ever declared a regular elevator under said rule any warehouse, which has not been licensed under said statute to conduct a warehouse of Class "A."

10. That at the present time there are twelve warehouses, with an aggregate capacity of 12,950,000 bushels, whose proprietors have received under said statute, licenses to conduct Class "A" warehouses, and which have been declared regular by the Exchange under said Rule XXI, for the year ending July 1, 1923.

19 That the space of each of said warehouses is subdivided into numerous partitions or bins, the capacity of said bins ranging from 2,000 bushels to 7,000 bushels; and that almost all grain is received in Chicago in cars, whose capacity is from 1,500 to 2,000 bushels, and whenever a carload of grain is unloaded into any of said elevators of Class "A," it is immediately carried into one of said bins and is there at once mixed with other grain of like grade already stored in such bin, and thus any individual carload of grain immediately loses its identity upon being received in such warehouse; and when the person, to whom the warehouse receipt is issued for such carload of grain, or his assignee, tenders said warehouse receipt to said warehouseman for the purpose of having the grain therein specified delivered to him, he never gets the identical grain delivered to such warehouse when it issued said receipt.

11. That in this trading for future delivery in the exchange room of said Exchange during any year many millions of bushels of wheat, corn and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without any delivery of any warehouse receipts, but are settled through a system of offsetting purchases with sales and the payment of differences in the market prices under a system commonly known as the "ringing" system which is provided for by the rules of said Exchange; and that practically all said remaining future contracts are performed or completed during the month specified for delivery by the delivery by buyers to sellers of warehouse receipts of public warehouses of Class "A" which ware-

houses have been made regular under the said rules of the Exchange.

20 That while said Rule XXI makes grain in cars deliverable on future contracts during the last three days of the delivery month mentioned in said contracts, where receipts are issued by the carrier, it is also provided by said rule that said delivery shall not be complete, and that bills for said grain so tendered shall not be payable, until said grain shall have been unloaded into an elevator which has theretofore been made regular for delivery by said board of directors, and elevator receipts covering said grain shall have been delivered to the buyer; and that the amount of grain in carload lots actually delivered under the provisions of this rule on contracts for future delivery is much less than 1 per cent of the total volume of said trading for future delivery and even a very small percentage of the total quantity of grain actually delivered upon said contracts; and that, while said rule also authorizes said board of directors, when an emergency exists, to provide that grain in cars may be tendered during any business day of the month specified in the contract for future delivery, said rule also provides that such tender shall not be deemed a complete delivery until such grain shall have been unloaded into an elevator made regular by said Exchange and the warehouse receipt therefor shall have been delivered to the buyer; and while said Rule XXI also authorizes said board of directors, when an emergency exists requiring more storage room than can be supplied by the regular elevators, to make other places suitable for the storage of grain regular for storage of grain deliverable under the rules of the Exchange, said Exchange has seldom, if ever, been able to induce proprietors of places otherwise suitable for the storage of grain to qualify under the Warehouse Statute of the State of Illinois for the short period of time during which any such emergency exists, and that the quantity of storage room in Class "A" warehouses declared regular by said Exchange is such that an emergency, such as is contemplated in said rule, rarely occurs in Chicago, and then lasts for only a short period of time, and that at the present time said board of directors of said Exchange have not exercised said emergency powers conferred upon them, and the only grain now deliverable on said future contracts is grain for which warehouse receipts have been issued by said regular elevators, and carloads of grain tendered during the last three days of the delivery month followed by delivery of warehouse receipts when such grain is unloaded into a regular elevator.

21 12. That a large part of the total volume of trading for future delivery in the exchange room of said Exchange above described consists of contracts made by grain merchants, millers and others, who make such contracts only for the purpose of insuring themselves against price fluctuations respecting other like grain owned by them for the purpose of merchandising or shipping to other consuming markets or to manufacture into flour, and that in most cases such contracts for future delivery are fulfilled, not by the delivery of the grain but by the making of counter-contracts to offset against the ones originally made; that another large part of the volume of said

future trading in said exchange hall consists of contracts made by or for so-called speculators, being persons who have capital and make a study of trade conditions affecting prices and endeavor to forecast the future prices of grain and to profit thereby through the making of said contracts for future delivery.

13. That there is produced yearly in the United States more wheat, corn and oats than is consumed within said United States; that from the year 1899 to the year 1913, both inclusive, the number of barrels of wheat-flour exported in any year, as disclosed by the statistics of the United States Department of Commerce, was not less than 8,826,-

000 barrels, and in one of said years the number of barrels
22 exported was 19,716,000; and that during one of said years there was exported 154,856,000 bushels of wheat, and except in one of said years (when there was a failure of the crops), there has been not one of said years in which the amount of wheat exported did not exceed 23,000,000 bushels; and that during one of said years there was exported over 209,000,000 bushels of corn, and in none of said years was there exported less than 26,000,000 bushels of corn and that yearly exports of oats during said years range from over 46,000,000 bushels to 1,000,000 bushels.

That in order to enable its members and their customers to have all obtainable knowledge when making their said contracts for present or future delivery, said Exchange gathers from all parts of the world such data and other information respecting the conditions of growing crops, the visible supply of grain on hand in different countries, the current prices of the different grains prevailing in the different grain markets of the world, etc., as it can obtain—incurring a large expense therein—and it makes such information available to all its members, and through them to their customers.

14. That approximately six-sevenths of all the trading in grains for future delivery upon the exchanges of the United States takes place in the exchange hall of said Chicago Exchange, but that other commercial exchanges which furnish to their members and their customers like facilities for making contracts for future delivery, are located and maintained at Minneapolis, Duluth, Kansas City, St. Louis and Toledo, Ohio; that the members of all of such other exchanges are competing with the members of said Chicago Exchange for the business of making contracts for future delivery for customers and the purchase of cash grain at country points; and
23 many of the members of said Chicago Exchange are also members of some or all of said other exchanges, and they trade in said other exchanges for future delivery when price conditions there, as compared with price conditions on said Chicago Exchange, make it profitable for them to do so; and that the facts above stated, as well as the present supply of available grain and the present and future requirements of the millers and consumers, not only in this country but in different countries of Europe, constitute the elements, which determine from time to time the prices, at which said future trading on said Exchange is transacted.

That everyone who participates in such future trading and in the making of prices therein does so only by so contracting as to incur a financial loss, if he is mistaken in his forecast of the course of future prices of grain; thus the prices prevailing in such future trading on each of said exchanges at any time is the expression of the preponderance of opinion among interested traders as to the future course of the prices of grain; and the rise and fall of prices in such future trading only express the normal operation of the natural law of supply and demand.

15. That, while in former times, when there were only a few participants in said future trading, who had large capital and credit, so-called "corners" in grain did occur at rare intervals, said Exchange has for many years maintained and enforced rules (which are set out in this bill) to prevent the running of such corners; and that by reason of such rules and their enforcement—and perhaps the Sherman Anti-Trust Act—no corners have for the last fifteen years occurred in the future trading in grain on said Exchange, or said other boards of trade; and that no member of said Exchange, or of any of said other boards of trade, has ever been indicted or convicted under any of the statutes, state or federal, which prohibit the running of "corners."

24 That such future trading on this and said other boards of trade has never been successfully resorted to by anyone for the purpose of manipulating or controlling, and thereby depressing, the prices of grain, and that selling for future delivery on said Exchange does not result in, nor have the effect of, causing the prices of grain to be abnormally depressed, or to be other than such as result from the unrestricted operation of the natural laws of supply and demand.

16. That neither said transactions for future delivery nor the prices therein are susceptible to speculation, manipulation or control by any persons; and that sudden or unreasonable fluctuations of prices of grain do not frequently occur as a result of speculation or manipulation or control of, prices, or transactions in said future trading on such exchanges; nor are such fluctuations as do occur in the prices in such future trading detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce. That, on the contrary, such future trading has materially stabilized the prices of grain and caused the fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice on such exchanges; and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products and by-products thereof.

That on the contrary the purchase and sale of grain for future delivery upon said Exchange and said other boards of trade is a distinct benefit to all producers and consumers, and to persons engaged in commerce in grain, in that it enables owners of grain to protect

25 themselves against price fluctuations by the making of "hedging" contracts upon such exchanges; and that, before said owners were able to so "hedge," the grain buyers' profits in moving the grain from the farmers to the foreign markets was from five to eight cents a bushel, which by the elimination of such risk has been reduced to not to exceed two cents a bushel.

That the prices of "cash" grain do not follow, or relatively conform to, the prices of like grains in the contracts for future delivery made on said Exchange or said other boards of trade; but that on the contrary the prices of "cash" are always different from said prices in future trading, and the former prices are at times higher than the latter prices.

17. That the "Future Trading Act" became a law August 24, 1921; that thereafter the co-complainants in this bill requested the board of directors of said Exchange to institute a suit to have such Act adjudged unconstitutional before complying therewith; that the said board of directors declined to do so, and thereupon these co-complainants (together with one Charles E. Gifford, who has since ceased to be a member of said Exchange) filed, on the 25th of October, 1921, in the District Court of the United States for the Northern District of Illinois (on their own behalf and on behalf of all other members of said Exchange who might wish to join therein, or share in the relief granted therein) their bill against said Exchange and those then constituting its board of directors, and also against the defendant herein, Charles F. Clyne, United States District Attorney for the Northern District of Illinois, John C. Cannon, Collector of Internal Revenue for the First District of Illinois—Henry C. Wallace, Secretary of Agriculture, and David H. Blair, Commissioner of Internal Revenue of the United States, were also named as defendants in said bill, but the court acquired no jurisdiction of their persons—and said bill contained the same allegations as are contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of this bill; and in said bill it was charged that Sections 4, 5, 6, 7, 8 and 10 of said Future Trading Act—which contain substantially the same provisions as Sections 4, 5, 6, 7, 8 and 9 of said Grain Futures Act—violated the Constitution of the United States in that they attempted to regulate commerce which was not interstate but purely intrastate in character; and in said bill said co-complainants prayed that each and every of said provisions of said Future Trading Act should be adjudged to violate the Constitution of the United States and to be void, and that an injunction might issue enjoining the defendant Charles F. Clyne, as such District Attorney, from attempting to enforce said Act or collect by suits or prosecutions, or otherwise, any tax, penalty, or fine mentioned in, or imposed by said Act, from any member of said Exchange, and enjoining said Exchange and its officers from qualifying as a contract market under said Act.

26

That thereafter said defendant Clyne, as such District Attorney, entered his appearance in said suit and also his motion to dismiss said complaint on the ground that said bill sought to enjoin the

enforcement of a valid Act of Congress, to wit, the said Future Trading Act; that thereafter, and on the 7th day of November, 1921, said cause came on for hearing in said District Court and said court entered a final decree therein dismissing said bill for want of equity; that thereupon your co-complainants duly perfected their appeal from said decree, and assigned as error that said District Court had erred in not adjudging said provisions of said Future Trading Act unconstitutional and void. That thereafter, and on the 10th day of November, 1921, said appeal was duly docketed in the Supreme Court of the United States, and on the 11th day of January, 1922, said appeal came on for hearing in said court, said Clyne appearing in said court by James M. Beck, Solicitor General of the United States; and that said Beck, introduced into the hearing of said cause in the Supreme Court the reasons which had induced Congress to enact said Future Trading Act, as shown by a statement made to the United States Senate by Senator Capper, who introduced the bill in the Senate and who, as the acting Chairman of the Committee on Agriculture (which made a report recommending the passage of the bill), stated the reasons of said committee why said bill should become a law, and that said statement which was so presented to the Supreme Court was in part as follows:

"Mr. President, if the Members of this body have the opportunity to read the entire record of the hearings before the House committee in January and the same committee in April, and the hearings before the Committee on Agriculture of this body held in May, June and July of this year, I believe that exactly this will be found to be the situation:

First. The market which governs the price paid to the farmers for their wheat and correspondingly the price paid for foodstuffs by our people in general, while controlled largely and necessarily by the law of supply and demand, is, nevertheless, seriously and occasionally affected by the manipulation of prices and by promiscuous and unlimited gambling.

* * * But we are attempting to correct it [speculation] in this bill, not merely because of its immoral character and influence but because of its arbitrary interference with economic laws and its disturbance of the balance that demand and supply of commodities when left to itself brings about. * * * But we know that temporarily, at last, the fictitious demand or fictitious supply created by gambling deals on the exchanges distorts true demand and supply and creates a false price; that it causes, and during the past year has caused violent and unnatural fluctuations; and that when wheat and corn came on the market a year ago the resumption of options dealing was immediately followed by such an orgy of gambling operations as to drive prices within a period of months far below the cost of production. * * *

The purpose of this bill, Mr. President, is to correct some of the evil practices of the professional speculators on the grain exchanges and to authorize supervision of the grain-futures markets, but not to disturb any of their legitimate and useful functions. * * *

Briefly summarized, the evils in the marketing system which this bill undertakes to correct are:

- (a) Market manipulation by large operators.
- (b) Promiscuous and unrestricted speculation in foodstuffs.
- (c) Dissemination of false crop information.

* * * * *

- (e) Arbitrary interference with the law of supply and demand.

* * * * *

Manipulation on the 'short,' or selling, side of the market by big speculators and 'bear raids' by their followers, such as happen every year shortly before or immediately following harvest, play directly into the hands of European importers, who are enabled to buy millions of bushels of wheat in the futures market at a reduced price, which they later exchange for cash wheat. On several occasions during this greatest export year for wheat the raiders of the wheat pit depressed the price of the American crop 12 to 14 cents below the world price, below the cheap wheat of South America.

In playing their game the Chicago wheat gamblers sold something they did not possess to bear down the price of something they did not own. They wrecked the true market, depressed the value of the producer's property, and the big speculators and exporters bought wheat cheaper and cheaper.

* * * In order that there may be no possible doubt that this manipulation of prices exists, I want to read you a few excerpts from the testimony of witnesses before the committees."

(And the statement of said senator contained extracts from the statements of persons who had appeared before said Committee.)

29 "The plain truth, Mr. President, is that through manipulation of the market the big speculators on the Chicago Board of Trade are undoubtedly a powerful factor in fixing the price of the farmer's wheat. They sell large volumes of wheat futures short during a period before harvest when there is no great volume of buying, and the weight of their selling forces the price down. Then, by continually hammering, they hold the price there until the crop movement begins, when hedging sales place sufficient pressure upon the market to enable the speculators to buy back what they sold without advancing the price. * * *

The provisions of the bill if enacted into law will * * * release the law of demand and supply and make these market places subservient to that great law of trade."

That thereafter said Supreme Court, on the 15th day of May, 1922, adjudged that said future trading was intrastate, and not

interstate, commerce, and that the provisions of said Future Trading Act above mentioned were unconstitutional and void because not within the power of Congress to regulate interstate commerce, and that your co-complainants should be granted an injunction against said Exchange and its officers and against said Clyne as District Attorney, and reversed said decree of the District Court and remanded said cause for further proceedings in conformity with the opinion of said Supreme Court, and said mandate being filed in said District Court, that court entered an order redocketing said cause and setting aside its former decree therein, and entered a final decree, wherein it adjudged and decreed that Sections 4, 5, 6, 7, 8 and 10 of said Future Trading Act were in violation of the Constitution of the United States and of no effect whatever, and permanently enjoining the defendant herein Charles F. Clyne as District Attorney as aforesaid from collecting or attempting to collect by suit or prosecution, or otherwise, any penalty or fine mentioned in and imposed by said Act for failure of any member of said Exchange to comply with said Sections 4, 5, 6, 7, 8 and 10 of said Act, which said decree remains in full force and effect; and your orators are advised by their counsel, and believe and claim, that the defendants herein are by reason of said decree and the facts hereinabove stated, estopped to claim or assert in this suit that said future trading is interstate commerce or is not intrastate commerce or that Congress had under the power conferred upon it to regulate interstate and foreign commerce, power to enact any of Sections 4, 5, 6, 7, 8 and 9 of said Grain Futures Act.

18. That prior to the passage of said Future Trading Act and said Grain Futures Act the Committees on Agriculture of Congress (to whom bills for said Acts were referred) did afford to some who favored or opposed the passage of said bills limited opportunities to be heard, but that all of said persons were interested parties and none of them were sworn as witnesses, and no evidence of witnesses under oath was heard by either of said Committees to ascertain whether such future trading or any feature thereof was an obstruction to, or a burden upon, interstate commerce in grain; and that, on the contrary, said statements made before said Committees did not show that the transactions and prices of grain in the future trading on this Exchange, or said other boards of trade, are susceptible to speculation, manipulation or control, nor that sudden or unreasonable fluctuations in prices of grain frequently occur as a result of such speculation, manipulation or control, which are detrimental to the producers or consumers, or to any other persons; but said statements showed that such fluctuations in said prices as do occur are not, and never have been, an obstruction to, or burden upon, interstate commerce in grain or the products or by-products thereof.

19. Your orators are advised by their counsel and charge said Grain Futures Act violates the Constitution of the United States in the following, as well as in other, respects:

(1) It violates Section 8 of Article I, and the 10th Amendment, of the Constitution, in that it seeks to regulate commerce which is not interstate, but purely intrastate in character, and which is not in any respect a burden upon, or an obstruction to, interstate commerce.

(2) It violates the 10th Amendment to the said Constitution in that it interferes with the exclusive right of the states to provide for, and regulate, the maintenance of grain exchanges within their borders for the making of contracts for future delivery of grain, which are wholly intrastate transactions.

(3) It seeks to deprive said Exchange and its members of their property without due process of law in violation of the 5th Amendment to the Constitution, in that by compelling the admission to membership in said Exchange of representatives of co-operative associations of producers, it deprives such Exchange and its members of their exclusive right to use their private property, and thereby it will impair the value of said property and all memberships in said Exchange.

(4) It violates the 5th Amendment to said Constitution in that it attempts, by forcing representatives of farmers' co-operative associations into membership of said Exchange, to take the private property of said Exchange and its members for public use without just compensation therefor.

(5) It violates Section 1 of Article III of the Constitution and the 5th Amendment thereto, in that it seeks to deprive members of said Exchange of their liberty without due process of law, in that it makes the violation of any of the provisions of said Act, and any attempt to manipulate the market price of grain, crimes, and constitutes the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, a Commission for the trial of such persons as shall be accused of such crimes, with power, as a punishment therefor, to deprive such offenders of their right to thereafter pursue a lawful vocation; whereas such criminal laws are, under the Constitution, enforceable only in courts created by law and presided over by judges holding office during good behavior.

(6) It violates Section 2 of Article III of the Constitution and the 6th Amendment thereto, in that it creates a crime and provides for a criminal prosecution therefor without according to the accused the right of trial by jury, and the right to be confronted with the witnesses against him.

(7) It violates the 4th and 5th Amendments to the Constitution in that it authorizes unreasonable searches by the Secretary of Agriculture respecting books and papers, which do not relate to any transaction within the commerce power of Congress, and authorizes the inspection by him of books and papers in order to enable him to secure evidence to be thereafter used by him in criminal proceed-

ings under said Grain Futures Act, against the owners of such books and papers.

(8) It violates the 5th Amendment to the Constitution in that it seeks to compel such members and their customers to furnish evidence which may be used in a criminal case against them.

(9) Section 4 of said Act, in so far as it seeks to restrict the use of the mails, is not within the power conferred on Congress to establish post offices and post roads.

(10) Section 4 of said Act, in so far as it seeks to prohibit the transmission by telegraph, etc., from one state to another of offers, orders, confirmations, etc., relating to the making of contracts for future delivery of grain upon your orators' Exchange is not within the commerce power of Congress, and it also violates Section 2 of Article IV of said Constitution.

20. That your orators are informed and believe that said Secretary of Agriculture has announced that he will not designate any exchange as a contract market under said Grain Futures Act, and will not permit any exchange to continue as a contract market thereunder, unless such exchange shall adopt, maintain and enforce against its members the following rules:

"Any member who, under sub-clause (b) of Section 6 of said Grain Futures Act, shall be deprived of the privileges of trading in contract markets, shall be suspended from all privileges of trading on the exchange of this Association for such period as may be specified in the order of the Secretary of Agriculture against such member.

Any member who shall accept, or execute, an order from any person who shall have been deprived of the privilege of trading in contract markets, shall be suspended from all privileges of membership in this Association for such time as the Directors, in their discretion, shall determine."

That said Secretary of Agriculture also announces that he will enforce, as far as it is incumbent upon him to do so, all the provisions of said Grain Futures Act, and that, if any exchange shall refuse to admit to membership any representative of any co-operative association of producers under the terms prescribed by subclause (c) of Section 5 of said Act, he will not designate such exchange as a contract market so long as it refuses to comply with said section, and that, if any exchange, which shall have been theretofore designated by him as a contract market, shall thereafter refuse to admit to membership such representatives in compliance with said clause, he will cause the designation of such exchange as a contract market to be terminated.

34 That said defendant Charles F. Clyne, as such District Attorney, threatens to, and will, enforce all the provisions of said Act, so far as it is incumbent upon him to do so, and that he will prosecute criminally, under section 9 of said Act, all such members

of said Exchange, and their customers, as shall make contracts for future delivery during such period as said Exchanges shall not be designated as a contract market under the terms of said Act.

Your orators further show that said threatened action by said District Attorney and said Secretary of Agriculture will—unless enjoined by this court—subject the members of such Exchange and their customers to many criminal prosecutions and to the payment of many accumulated penalties, and that through fear of such prosecutions many members of said Exchange and their customers will be deterred from making contracts for future delivery upon said Exchange and that thereby a serious disturbance of the grain markets of the country will ensue and many owners of grain will be deprived of the privilege of insuring themselves against price fluctuations through “hedging” contracts on such Exchange, and that thereby irreparable loss will be caused to your orators, the many members of said Exchange, and many others.

21. That as respects each of your orators the amount involved and the matters in dispute in this suit, exclusive of interest and costs, is more than \$3,000.

Forasmuch, therefore, as your orators are remediless in the premises except in a court of equity, and to the end that said Charles F. Clyne, as United States District Attorney, as aforesaid, Henry C. Wallace, as Secretary of Agriculture, and Arthur C. Lueder, as United States Postmaster in the City of Chicago, may be required to make direct, true and complete answer to this bill, but not
35 under oath (answers under oath being hereby waived); and that each and every provision of said Grain Futures Act be adjudged to violate the Constitution of the United States and to be void, and that a temporary injunction may immediately issue, and upon final hearing be made permanent, enjoining and restraining said Charles F. Clyne, as District Attorney, as aforesaid, from attempting to enforce said Act or to prosecute, criminally or otherwise, under Section 9 of said Grain Futures Act, any member of said Exchange or any customer of said member; and enjoining said Henry C. Wallace, as Secretary of Agriculture, from enforcing or attempting to enforce, against said Exchange or any of its members or their customers any of the provisions of said Act; and also enjoining said Arthur C. Lueder, as said Postmaster, from complying with said Act or interfering with any of the mail passing to or from members of said Exchange and customers of said members, and that your orators may have such other and further relief as to your Honors shall seem meet.

May it please your Honors, to grant unto your orators a preliminary and permanent injunction against said defendants as above prayed, and also a writ of subpoena of the United States directed to said Charles F. Clyne, as United States District Attorney for the Northern District of Illinois, Henry C. Wallace, as Secretary of Agriculture, and Arthur C. Lueder, as United States Postmaster at the City of Chicago, commanding them on a day certain to appear and

answer this bill, and to abide by and perform such decree as may be entered by this court.

ROBBINS, TOWNLEY & WILD,
Solicitors for Complainants.

HENRY S. ROBBINS,
Counsel.

36 STATE OF ILLINOIS,
County of Cook, ss:

John R. Mauff, being duly sworn, says that he is the Secretary of the Board of Trade of the City of Chicago, one of the complainants in the above entitled bill, and that he has read said bill and knows the contents thereof, and that all the allegations of said bill are true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

JOHN R. MAUFF.

Subscribed and sworn to before me, a notary public in and for said County and State, this 30th day of October, A. D. 1922.

[SEAL.]

A. S. PAPENGUTH,
Notary Public.

EXHIBIT A.

Charter of Chicago Board of Trade.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. That the persons now composing the Board of Trade of the City of Chicago, are hereby created a body politic and corporate, under the name and style of the "Board of Trade of the City of Chicago," and by that name may sue and be sued, implead and be impleaded, receive and hold property and effects, real and personal, by gift, devise or purchase, and dispose of the same by sale, lease, or otherwise (said property so held not to exceed at any time the
37 sum of two hundred thousand dollars); may have a common seal, and alter the same from time to time; and make such Rules, Regulations and By-Laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

Sec. 2. That the Rules, Regulations and By-Laws of the said existing Board of Trade shall be the Rules and By-Laws of the corporation hereby created, until the same shall be regularly repealed or altered; and that the present officers of said Association, known as the "Board of Trade of the City of Chicago," shall be the officers of the corporation hereby created, until their respective offices shall regularly expire or be vacated, or until the election of new officers according to the provisions hereof.

Sec. 3. The officers shall consist of a President, one or more Vice-Presidents, and such other officers as may be determined upon by the Rules, Regulations, or By-Laws of said corporation. All of said officers shall respectively hold their offices for the length of time fixed upon by the Rules and Regulations of said corporation hereby created, and until their successors are elected and qualified.

Sec. 4. The said corporation is hereby authorized to establish such Rules, Regulations and By-Laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

Sec. 5. The time and manner of holding elections and making appointments of such officers as are not elected, shall be established by the Rules, Regulations and By-Laws of said corporation.

Sec. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the Rules, Regulations and By-Laws thereof.

38 Sec. 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of Appeal, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations or By-Laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the Association, or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute.

Sec. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the Rules or By-Laws, then, on filing such award and submission with the Clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment rendered in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court.

Sec. 9. It shall be lawful for said corporation, when they shall think proper, to receive and require of and from their officers, whether elected or appointed, good and sufficient bonds for the faithful discharge of their duties and trusts; and the President or Secretary is hereby authorized to administer such oaths of office as may be prescribed in the By-Laws or Rules of said corporation. Said bonds shall be made payable and conditioned as prescribed by the Rules or By-Laws of said corporation, and may be sued and the moneys collected and held for the use of the party injured, or such other use as may be determined upon by said corporation.

39 Sec. 10. Said corporation shall have power to appoint one or more persons, as they may see fit, to examine, measure,

weigh, gauge, or inspect flour, grain, provisions, liquor, lumber, or any other articles of produce or traffic commonly dealt in by the members of said corporation; and the certificate of such person or inspector as to the quality or quantity of any such article, or their brand or mark upon it, or upon any package containing such article, shall be evidence between buyer and seller of the quantity, grade or quality of the same, and shall be binding upon the members of said corporation, or others interested, and requiring or assenting to the employment of such weighers, measurers, gaugers, or inspectors: nothing herein contained, however, shall compel the employment, by any one, of any such appointee.

Sec. 11. Said corporation may inflict fines upon any of its members, and collect the same, for breach of its Rules, Regulations, or By-Laws; but no fine shall exceed five dollars. Such fines may be collected by action of debt, before a justice of the peace, in the name of the corporation.

Sec. 12. Said corporation shall have no power or authority to do or carry on any business excepting such as is usual in the management of boards of trade or chambers of commerce, or as provided in the foregoing sections of this bill.

WM. R. MORRISON,

Speaker of the House of Representatives.

JOHN WOOD,

Speaker of the Senate.

Approved February 18, 1859:

WM. H. BISSELL.

40

EXHIBIT B.

Containing Certain Rules of the Board of Trade.

Rule IV.

Sec. 9. When any member shall be guilty of improper conduct of a personal character in any of the rooms of the Association, or shall violate any of the rules, regulations or by-laws of the Association or shall be guilty of any dishonorable conduct, for which a specific penalty has not been provided, he shall be suspended by the Board of Directors from all the privileges of membership for such period as in their discretion the gravity of the offense committed may warrant. When any member shall be guilty of making or reporting any false or fictitious purchase or sale, or where any member shall be guilty of an act of bad faith, or any attempt at extortion or of any dishonest conduct, he shall be expelled by the Board of Directors. Or when a member shall, either in the Exchange building or elsewhere, contract to give to himself or another the option to sell or buy any of the articles dealt in on this Exchange in violation of any criminal statute of this State, he shall forfeit the right to have said contract enforced under the rules of this Association.

Any member suspended from the privileges of the Association shall not be allowed to trade or do any business upon the floor of the Exchange in his own name, either through a broker or employee. * * *

Sec. 16. All charges made to the Board of Directors against any member of the Association for any default, misconduct, or offense, shall be in writing, and in duplicate, and shall state the default, misconduct or offense charged; and the same shall be signed
41 by one or more members of the Association, by a business firm, one or more of whose members shall be a member of the Association, or by the Chairman of a committee of the Association.

Rule X.

Membership and Assessments.

Section 1. All applications for membership in the Association shall be referred to the Committee on Membership, who shall hold regular stated meetings for examining such applicants and their sponsors, in person, under such rules and regulations as may be made by the Board of Directors. Any male person of good character and credit, and of legal age, on presenting a written application, indorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the Exchange, may be admitted to membership upon approval by at least ten (10) affirmative ballot votes of the Board of Directors; provided, that three negative ballot votes are not cast against such applicant, and upon payment of an initiation fee of twenty-five thousand dollars, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the Rules, Regulations and By-Laws of the Association, and all amendments that may be made thereto.

Sec. 2. Every member shall be entitled to transfer his membership when he has paid all assessments due, and has against him no outstanding unadjusted or unsettled claims or contracts held by members of this Association and said membership is not in any way impaired or forfeited, upon the payment of two hundred and fifty
42 dollars, to any person eligible to membership who may be approved for membership by the Board of Directors, after due notice by posting, as provided in Section 1 of this rule. The membership of a deceased member shall be transferable in like manner by his legal representative without the payment of the transfer fee. Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the exchange for at least ten days when, if no objection is made, it shall be assumed the member has no outstanding claims against him.

Rule XXI.

Regular Deliveries.

Section 1. All deliveries upon contracts for grain or flax seed, unless otherwise expressly provided, shall be made by tender of regular warehouse receipts, which receipts shall have been registered by an officer duly appointed for that purpose. All such warehouse receipts shall be made to run five days from date of delivery on regular or customary storage charges, which regular or customary charges shall follow such warehouse receipts and be chargeable upon the property covered by the same, and shall be issued by such houses as have complied with the Rules of the Board of Trade and the Regulations and Requirements of the Board of Directors, and have been declared regular warehouses for the storage of grain or flax seed by said Board of Directors; and it shall be the duty of the Board of Directors, prior to the first day of July in each year, to inspect all warehouses, the proprietors or managers of which shall apply to have their receipts declared regular for delivery on contracts under the Rules of the Board of Trade, and no warehouse shall be declared a regular warehouse unless it is conveniently approachable by vessels of ordinary draft and has customary shipping facilities, and unless the storage rates on all grain or flax seed in such warehouses in bulk and in good condition, shall not be in excess of one and one-quarter ($1\frac{1}{4}$) cents per bushel for the first ten days or part thereof, and one-twentieth (1-20th) of one cent per bushel for each additional day thereafter so long as such grain or flax seed remains in good condition, and unless the proprietors or managers of such warehouse are in good financial standing and credit and are carrying on and intend to continue to carry on the legitimate business of public warehousemen under the laws of the State of Illinois and in accordance with the Rules of the Board of Trade of the City of Chicago and the Regulations and Requirements of the Board of Directors and until the proprietors or managers of such warehouse shall file a bond with sufficient sureties in such sum and subject to such conditions as may be deemed necessary by the Board of Directors, under the Rules of the Board of Trade and the Regulations and Requirements of the Board of Directors in reference to warehouses. * * *

Warehouse receipts issued by warehouses so declared regular by the Board of Directors shall be regular for delivery on contracts under the Rules of the Board of Trade so long as the said warehouse shall continue to be a regular warehouse, but the term for which any warehouse is declared a regular warehouse to issue such receipts shall be limited to and expire on the first day of July in each year. No receipts issued on grain received in any warehouse shall be regular for delivery under the Rules of the Board of Trade after that date unless the warehouse upon which it has been issued has again been declared a regular warehouse by the Board of Directors; provided, however, that receipts issued before the first day of July by ware-

houses which have been regular warehouses during the preceding year, but which have not been declared regular for the succeeding year, shall be regular for delivery upon such contracts for six months after the first day of July; but nothing contained herein shall prevent the Board of Directors from declaring any warehouse, or the receipts thereof, irregular at any time for violation or non-compliance with the laws of the State of Illinois or any of the Rules of the Board of Trade or of the Regulations and Requirements of the Board of Directors.

Provided, that the Board of Directors shall have power, when in their judgment an emergency exists requiring more storage room than can be supplied by the regular elevator warehouses, or because of an inability to obtain insurance on grain stored therein, to declare any storehouses, vessels, or places suitable for the storage of grain or flax seed within the Chicago Switching District—wherein the cost of delivery to vessels or railroad cars shall not be greater than such as is made by the regular elevators for the same service—to be regular places for the storage of grain deliverable under the Rules of the Board of Trade.

And provided further, that in case it shall happen that at any time there shall be no warehouses which shall be regular warehouses for the storage of grain and flax seed, then the Board of Directors may declare any warehouses suitable for the storage of grain or flax seed, whose aggregate capacity shall not exceed twenty-five million (25,000,000) bushels, regular warehouses for the storage of grain or flax seed, upon such terms and for such period as the Board of Directors in its discretion may deem necessary or proper, and the warehouse receipts issued by warehouses so declared regular under this proviso, shall be regular for delivery on contracts under the Rules of the Board of Trade, in the same manner as if issued by warehouses declared regular under the foregoing provisions of this section in regard to declaring warehouses regular for the term ending on the first day of July in each year. * * *

45 On and after January 1, 1915, grain in cars, including that graded "subject to approval," shall be deemed a valid tender on contracts during the last three business days of any month, under the provisions of the rules pertaining to the delivery of warehouse receipts—the railroad receipt issued against same evidencing ownership serving to convey the title to the grain, same as warehouse receipts issued against grain in warehouses—when conforming to the following requirements:

A. When within the Chicago Switching District; or, if arriving from outside of the same, when it has reached the railroad yards, where samples are taken by the Illinois State Grain Inspection Department, and when billed to an elevator the receipts of which are regular on delivery; provided nevertheless, that grain so delivered shall be unloaded into the elevator to which it is billed before the delivery shall be deemed complete, and bills for grain so tendered shall not be due and payable until the elevator receipt covering same shall have been delivered to the buyer. Provided further, that deliveries under this rule may be diverted by the buyer from unload-

ing at a regular warehouse to any other unloading where the same will be weighed by the Weighing Department of this Association, by paying for the property before diversion. * * *

E. At any time when, in the judgment of the Board of Directors, an emergency exists, grain in cars shall be deemed a valid tender on contracts, on any business day of any month, when the grade of such grain tendered is evidenced as being a proper grade under the rules for tender, by a certificate of inspection of the Illinois State Grain Inspection Department showing the inspection to have been made during the preceding seventy-two hours, and when conforming to the other requirements of Paragraphs A, B, C and

46 D of this Section, except that any excess or shortage in weights at time of unloading, if then weighed by the Weighing Department of this Association, shall be settled for at the current market value on day such variation is known to both parties.

Rule XXIII.

Failure to Deliver or Receive on Contracts.

Section 1. In case any property contracted for future delivery is not delivered at maturity of contract, the President shall appoint a committee of three from the membership at large, to be approved by the Board of Directors, which Committee shall determine as nearly as possible the true commercial value of the commodity in question on the day of the maturity of the contract, and the price so established shall be the basis upon which settlement is made.

It shall be the duty of the Committee in determining the true commercial value of the commodity under this Rule, to ascertain its value in other established markets, or for manufacturing or consumptive purposes, in this country, together with such other facts as may justly enter into the determination of its value.

As liquidated damage the seller shall pay to the purchaser not less than one per cent nor more than ten per cent of the value of the commodity as established by the Committee; the percentage, within said limits, to be such as, in the judgment of the Committee, may be just and equitable.

Settlement shall be made without delay, and the damage as determined under the provisions of this Section, shall be immediately due and payable.

This section shall not be construed as applying to any parties having the property both bought and sold, in all of which cases settlement shall be made on basis of prices established by the contracts in such instances.

47-49 Sec. 2. In case any property contracted for future delivery is not received and paid for when properly tendered, it shall be the duty of the seller, in order to establish any claim on the purchaser, to sell it on the market at any time during the next twenty-four hours, at his discretion, after such default shall have been made, notifying the purchaser within one hour of such sale; and any loss resulting to the seller shall be paid by the party in default. * * *

50 And afterwards on, to wit, the 30th day of October, 1922, this matter coming on to be heard, the following order was entered by the Court:

51 In the District Court of the United States, Northern District of Illinois, Eastern Division.

October 30, 1922.

Present: Honorable George A. Carpenter, District Judge.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

Order.

Upon filing the bill of complaint herein, and on motion of complainants' counsel,

It is ordered that defendants show cause before this court, at ten o'clock a. m., on the 13th day of November, 1922, why a temporary injunction should not issue as prayed by said bill.

And it appearing to the court that it will be prejudicial to the public interest, and will cause irreparable injury to the complainants herein, if future trading on the Chicago Board of Trade shall be suspended or disturbed pending the hearing of the foregoing motion, and that the time intervening before said Grain Futures Act becomes operative is too short to permit of notice of, and arguments upon, the application for a temporary restraining order,

It is further ordered That the defendant Charles F. Clyne, as United States District Attorney for the Northern District of Illinois, be enjoined and restrained from attempting to enforce said Grain Futures Act prior to the hearing and decision by this court of said motion, and also from at any time prosecuting criminally or otherwise, under Section 9 of said Grain Futures Act, any member of said The Board of Trade of the City of Chicago, or any customer of any such member, for or by reason of any violation by him or them of said Act prior to the hearing and decision of said motion by this court; and that said Arthur C. Lueder, as Postmaster of the City of Chicago, be also restrained from interfering with any of the mail passing to or from members of the Chicago Board of Trade and customers of said members prior to the hearing and decision by this court of said motion.

Enter.

CARPENTER,

Judge.

30 Oct., 1922.

53 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Answer, in words and figures following to-wit:

54 *Answer.*

In the District Court of the United States, Northern District of Illinois, Eastern Division.

D. C. In Chancery.

Equity. No. 3046.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

55 *Answer.*

The joint and several answer of Charles F. Clyne, United States Attorney for the Northern District of Illinois; Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United States Postmaster at the City of Chicago, defendants, to the bill of complaint.

These defendants, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill, come and answer thereto, or to so much thereof as they are advised is material to be answered, and say:

I.

The defendants admit the allegations of paragraph I of complainants' bill, but further answering said paragraph I, the defendants allege that Section 1 of the Act of the State of Illinois creating the Board of Trade of the City of Chicago, hereinafter referred to as the "Exchange," expressly provides that the rules and by-laws made from time to time for the government of said Exchange shall not be "contrary to the laws of the land."

The defendants, further answering complainants' bill, aver that the special charter granted by the State of Illinois to said Exchange, which is incorporated in complainants' bill as Exhibit A, confers upon said Exchange quasi-public and judicial powers, including the power to subpoena witnesses, administer oaths and make awards, which said awards, when filed in court, have the force and effect of a judgment, and also confers upon said Exchange the power to appoint one or more persons to examine, measure, weigh and inspect flour, grain and other articles of produce dealt in by the members of

56 said Exchange, and provides that the certificate of such person or persons as to the quality or quantity of any such article shall be evidence between buyer and seller of the quantity, grade or quality of the same and shall be binding upon the members of said Exchange or others interested. The defendants further aver that the bestowal of these powers upon said Exchange, and the acceptance and the long-continued exercise thereof by said Exchange, operate to impress said Exchange with a public interest and affects it with a public use, and by reason thereof said Exchange is estopped to claim or assert in this suit that it does not conduct a business affected with a public use.

And, further answering said bill, the defendants allege that the Supreme Court of Illinois, in the case of New York & Chicago Grain & Stock Exchange v. Chicago Board of Trade, 127 Ill. 153, decided January 25, 1889, in discussing the question whether the business conducted on said Exchange is affected with a public use, said:

It has been said, and with much show of reason, that the floors of this Exchange hall stand in the gateway of commerce. * * *

Four-fifths of the grain and provisions produced in the States and Territories of the Northwest are bought and sold in this market, and the business there done is so vast in its proportions that it fixes the market prices of grain, breadstuffs and meats for the extensive territory that is tributary to Chicago, and seriously affects and to a considerable extent controls the values of the necessities of life throughout the United States and the civilized world.

(2 L. R. A. 412.)

For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessities of life throughout the country and the world.

The great power and influence which the Board possesses in dictating market values is owing to the vast aggregation of products which are drawn to its portals for a market and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business, though in form and as between the members the mere private and individual dealings of such members, is in reality the business of the numerous producers, consumers, merchants and shippers for and on behalf of whom these members deal.

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* * * * *

In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and determined on the Board of Trade; and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports inaugurated and for years persisted in by the Board of Trade and the telegraph companies.

And the court further said:

Assuming that these market quotations and reports are property, and the private property of the Board of Trade, yet if they have been so used by the board and by the telegraph companies with the knowledge and consent of the board as to become affected with a public interest, then they are subject to such public regulation by the Legislature and the courts as is necessary to prevent injury to such public interest.

The defendants further allege that in said decision the Supreme Court of Illinois decided that the quotations of grain prices emanating from said Exchange are affected with a public interest and that said decision is conclusive on the complainants as to the public character of said quotations.

And defendants, furthering answering said bill, allege that all the business conducted upon the said Exchange is affected with a national public interest.

II.

The defendants admit the allegations contained in paragraph II of complainants' bill.

III.

The defendants admit the allegations contained in paragraph III of complainants' bill, except that defendants are without knowledge as to whether said Exchange has ever admitted to membership any corporation, but the defendants aver that the rules, regulations and by-laws of said Exchange may be repealed or altered at any time.

58

IV.

The defendants admit the allegations contained in paragraph IV of complainants' bill.

V.

The defendants admit the allegations contained in paragraph V of complainants' bill and, further answering the said paragraph, the defendants allege:

(a) That members of said Exchange receive from members and non-members outside of the State of Illinois by telegraph, telephone, cable and other instrumentalities and agencies of interstate and foreign commerce, and accept and execute for them, offers or orders to buy and sell "cash" grain and contracts for grain for future delivery, and

(b) That the said Exchange does acquire valuable commercial and economic information affecting prices of grain which it disseminates or causes to be disseminated through the instrumentalities

and agencies of interstate and foreign commerce. That the said Exchange is the largest and most important market in the world for trading in grain for future delivery, and that the prices of transactions entered into thereon form the basis for and dominate the prices of cash grain and transactions for future delivery in interstate and foreign commerce throughout the world, and that the quotations as published by said Exchange are of immense value to the grain trade and to the public in general in determining the prices of grain in interstate and foreign commerce.

VI.

The defendants admit subdivision F of Rule XIV as set out in paragraph VI of the complainants' bill, but as to the other allegations contained in said paragraph, defendants say they have
59 no knowledge or belief sufficient either to admit or deny the same, and therefore demand strict proof of the same, and aver on information and belief that whatever increase in value may have accrued to memberships in said Exchange is not due solely to any restrictions upon the number of members or to the expulsion of members.

VII.

The defendants admit the allegations contained in paragraph VII of complainants' bill with these exceptions:

(a) The defendants deny that the refunds of cooperative associations, which are popularly called patronage dividends, are rebates.

(b) The defendants are without knowledge as to the allegations therein contained with reference to the organization, methods and purposes of the United States Grain Growers, Incorporated, of Delaware, and demand strict proof thereof.

(c) The defendants, further answering said paragraph, admit that said cooperative associations have sought, without formal application, to become members of said Exchange and that said Exchange has refused them admission therein. The defendants allege that they are without knowledge as to the reason for such refusal and demand strict proof thereof.

(d) The defendants, further answering said paragraph, deny that the admission of such members or representatives would break down the commission rule of said Exchange and ultimately destroy the business of such members of said Exchange as consists in the receiving of grain by consignment for sale on commission. The defendants deny that the ultimate effect of such admission would be to much impair, if not destroy, the value of the memberships of said Exchange and make it difficult for said Exchange to maintain sufficient members who would be willing to pay assessments to
60 meet the expenses of maintaining said Exchange.

VIII.

The defendants deny the allegation contained in paragraph VIII of the complainants' bill that the members of said Exchange engage only in the different kinds of trading in grain set out in said paragraph VIII.

The defendants admit the allegations contained in subdivision (1) of paragraph VIII of the complainants' bill. Further answering said subdivision (1), defendants allege that the bulk of the cash grain which is bought and sold on and through said Exchange in Chicago is shipped into Chicago from many states other than Illinois, and that, after sale, the bulk of said grain is shipped out of the State of Illinois into other States and foreign countries.

The defendants admit the allegations contained in subdivision (2) of said paragraph VIII.

Further answering said subdivision (2), the defendants allege that the bulk of said offers to buy cash grain for deferred shipment are sent by mail and by telegraph, telephone and other instrumentalities and agencies of interstate and foreign commerce by members of said Exchange to country grain dealers and others at points outside the State of Illinois; and that the bulk of said offers to sell cash grain for deferred shipment are sent in interstate and foreign commerce by members of said Exchange to millers and other grain buyers at points outside the State of Illinois, in other States and foreign countries, and that the acceptance and fulfillment of such offers oblige the shipment of grain in interstate and foreign commerce.

The defendants deny the allegation contained in subdivision (3) of said paragraph VIII that both buyers and sellers in all
61 said contracts for future delivery are personally present in the City of Chicago when the contracts are made. The defendants admit all the other allegations contained in said subdivision (3).

Further answering said subdivision (3), the defendants allege that the bulk of the contracts for future delivery of grain which are executed by the members upon said Exchange and referred to in said subdivisions (3) originate outside of the State of Illinois and are made for persons who are not present in Chicago or the State of Illinois at the time of the execution or settlement of said contracts in the City of Chicago; that the orders for the making of the bulk of said contracts are communicated to the members of said Exchange by persons outside of the State of Illinois, through the instrumentalities and agencies of intrastate and foreign commerce, and that the principals in the bulk of said contracts are neither present nor residing in the state of Illinois.

Further answering said paragraph 8, the defendants deny that the use of said Exchange for the making of contracts for speculative purposes is a minor incidental part of the general use of said Exchange for trading in grain.

IX.

The defendants admit that Rule XXI set out in Exhibit B, which is made a part of the complainants' bill and referred to in paragraph IX thereof, is a rule of said Exchange; that said rule provides for the delivery of warehouse receipts instead of the grain, and only of such warehouse receipts as the rules of said Exchange make valid for delivery; that only such warehouse receipts are deliverable upon contracts for future delivery as shall be issued by warehouses which have

62 complied with the rules, regulations and requirements of said Exchange and have been, by the Board of Directors of said Exchange, declared regular warehouses for the storage of grain. The defendants aver that such warehouse receipts are merely a means of making delivery of the actual grain. The defendants admit that none of the warehouses thus made regular is located outside of the State of Illinois; that said rules make it the duty of said Board of Directors, on the first day of July each year, to designate the grain elevators or warehouses in Illinois whose receipts shall be deliverable between its members on their contracts for future delivery for the ensuing year; that said rule provides that the Board of Directors may declare as regular elevators only such elevators or warehouses as have been licensed by the State of Illinois to conduct a public warehouse; that the law of Illinois provides that it shall be the duty of every warehouseman of Class A to receive for storage any grain tendered him and to mix such grain with other grain of a similar grade received at the same time as near as may be; that said law provides that the warehouse receipt issued for such grain so received in said warehouse shall state on its face that the grain mentioned therein has been received into store to be stored with other grain of the same grade received about the same time, and that said law provides that when any holder of any such warehouse receipt shall demand the delivery of the grain therein mentioned, said warehouseman shall deliver on said receipt such of the grain of that particular grade as was first received by him in store or had been the longest time in store in his warehouse.

The defendants admit that said Exchange has never declared a regular elevator, under said rule, any warehouse which has not been licensed under the laws of Illinois to conduct a warehouse of Class A.

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X.

The defendants admit the allegations contained in paragraph X of complainants' bill.

XI.

The defendants admit the allegations contained in paragraph XI of complainants' bill with the exception that they deny that portion of said paragraph which alleges that the Board of Directors of said Exchange have not exercised the emergency powers conferred upon them with reference to delivery of grain in cars on track during any business day of the month of delivery.

XII.

The defendants admit the allegations contained in paragraph XII of complainants' bill.

XIII.

The defendants admit the allegations contained in paragraph XIII of complainants' bill.

XIV.

The defendants admit the allegation contained in paragraph XIV of complainants' bill that approximately six-sevenths of all the trading in grains for future delivery upon the Exchanges of the United States take place in the Exchange hall of said Exchange and that other commercial exchanges which furnish to their members and customers like facilities for making contracts for future delivery are located and maintained at Minneapolis, Duluth, Kansas City, St. Louis, and Toledo, Ohio. The defendants are without knowledge as to whether the members of the other exchanges mentioned in said paragraph XIV are competing with the

64 members of said Chicago Exchange for the business of making contracts for future delivery for customers and demand strict proof thereof. The defendants admit that there is such competition with respect to the purchase of cash grain at country points; that many of the members of the Chicago Exchange are also members of some or all of said other exchanges; that they trade through the instrumentalities and agencies of interstate commerce in said other exchanges for future delivery of grain when price conditions there, as compared with price conditions on the Chicago Exchange, make it profitable for them to do so, and that the present supply of available grain and the present and future requirements of the millers and consumers, not only in this country but in different countries of Europe, constitute some of the elements, but they deny that they constitute all of the elements, which determine from time to time the prices at which said future trading on said Exchange is transacted.

The defendants, further answering said paragraph XIV, deny all the other allegations therein contained and specifically deny that the rise and fall of prices in such future trading only express the normal operation of the natural law of supply and demand.

XV.

The defendants admit the allegation contained in paragraph XV of complainants' bill that there have been corners in grain on said Exchange. The defendants deny that said Exchange has for many years maintained and enforced rules to prevent the running of such corners. The defendants further deny that by reason of such rules and their enforcement—and perhaps the Sherman Anti-Trust Law—no corners have for the last fifteen years occurred

in future trading in grain on said Exchange or other boards of trade and that no member of said Exchange or of any of said other boards of trade has ever been indicted or convicted under
 65 any of the statutes, State or Federal, which prohibit the running of corners. The defendants further deny that such future trading on said Exchange or any other board of trade has never been successfully resorted to by any one for the purpose of manipulating or controlling, and thereby depressing, the prices of grain. The defendants further deny that a sale for future delivery on said Exchange does not result in, nor have the effect of, causing the price of grain to be abnormally depressed or to be other than such as results from the unrestricted operation of the natural law of supply and demand.

The defendants, further answering said paragraph XV, aver that said Rule XXI and other rules of said Exchange with respect to the delivery of grain or warehouse receipts in fulfillment of future contracts constantly encourage and create fluctuations in grain prices and induce and facilitate manipulation of, and corners and attempts to corner, the grain market, in that said Rule XXI excludes from delivery on said contracts any grain which is not in storage in designated warehouses, the combined capacity of which is only 12,950,000 bushels and is wholly inadequate because of the gross disproportion between such capacity and the grain involved in such future contracts, which amounts annually to about 15,000,000,000 bushels. The defendants further aver that complainants' rules extending the facilities for such delivery in prescribed emergencies do not remedy the situation, but invite further manipulation and discrimination with respect to the application and operation of said rules, and that said emergency rules show the inadequacy of the delivery facilities provided by said Exchange.

The defendants further aver that the existence of these rules operates as a threatening and depressing factor upon prices, in that, at the time contracts are entered into it is not known whether
 66 or when the emergency rules will be invoked and when invoked the buyer must either wait until the seller finds adequate space in one of the regular warehouses and makes delivery of warehouse receipts in accordance with his contract, or the buyer must accept delivery of the cars of grain on the railroad track with demurrage and the responsibility for warehousing the grain himself, and must run the risk of inability to fulfill other contracts that he may have executed for the delivery of such grain in interstate or foreign commerce.

XVI.

The defendants deny each and all of the allegations contained in paragraph XVI of complainants' bill. The defendants, further answering paragraph XVI of complainants' bill, aver that the prices involved in contracts for the purchase and sale of grain for future delivery are generally quoted and disseminated by mail and by telegraph, telephone, cable and other instrumentalities and agencies of interstate and foreign commerce throughout the United States

and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products thereof and to facilitate the movement thereof in interstate and foreign commerce; that such contracts for the purchase and sale of grain for future delivery are utilized by shippers, dealers, millers and others engaged in handling grain and the products thereof in interstate and foreign commerce as a means of hedging themselves against possible loss through fluctuations in price; that the contracts for the purchase and sale of grain for future delivery, and prices of grain on said Exchange and other boards of trade in the United States, are susceptible to speculation, manipulation and control, and that such prices and contracts in future trading on said Exchange and other boards of trade, have been from time to time, and are, manipulated and controlled; that sudden and unreasonable fluctuations in the prices thereof have occurred and do occur frequently as a result of such speculation, manipulation and control; that such fluctuations are detrimental to producers and consumers and persons handling grain and the products thereof in interstate and foreign commerce; and that such fluctuations in prices have been and are an obstruction to, and a burden upon interstate and foreign commerce in grain and the products thereof.

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XVII.

The defendants admit all the allegations contained in paragraph XVII of complainants' bill except that they deny

(a) that the Supreme Court of the United States, on the fifteenth day of May, 1922, adjudged that such future trading was intrastate and not interstate commerce and that the provisions of said The Future Trading Act were unconstitutional and void because not within the power of Congress to regulate interstate commerce, and (b) they deny that the defendants herein are, by reason of such decree and the facts in said bill stated, estopped to claim or assert in this suit that said future trading is interstate and not intrastate commerce, or that Congress had, under the power conferred upon it to regulate interstate and foreign commerce, power to enact any of Sections 4, 5, 6, 7, 8, and 9 of said The Grain Futures Act.

The defendants, further answering said paragraph XVII, allege that the complainants have misconstrued the decree of said Supreme Court, as shown by the opinion, which is by reference made a part of this paragraph of defendants' answer.

XVIII.

The defendants deny all the allegations contained in paragraph XVIII of complainants' bill except that defendants admit that prior to the passage of said The Future Trading Act and said The Grain Futures Act the Committees on Agriculture in Congress did conduct hearings and did offer such interested parties as desired to be heard, an opportunity to appear and to testify and to be heard for and

against the passage of said bills, and that such persons who appeared as witnesses were not sworn. And, further answering said paragraph XVIII, the defendants allege that officers, directors and other representatives of said Exchange and other boards of trade did attend and introduce both oral and documentary evidence at such hearings and that the testimony and statements taken at said hearings did show that the transactions and prices of grain in future trading on the Chicago Exchange and other boards of trade have been and are susceptible to speculation, manipulation and control; that sudden and unreasonable fluctuations in prices of grain have and frequently do occur as a result of such speculation, manipulation and control, which are detrimental to the producers and consumers and persons handling the grain and products thereof, and further, that the evidence and statements submitted at said hearings showed that such fluctuations in said prices as do and have occurred are and have been an obstruction to and a burden upon interstate commerce in grain and the products thereof.

The defendants further aver that The Grain Futures Act is not the result solely of the hearings and proceedings in Congress alleged in complainants' bill, but is, in fact, the culmination of more than thirty years of consideration and investigation by Congress and Federal agencies of the business of trading in grain and other commodities for future delivery and the effects thereof upon interstate and foreign commerce.

XIX.

The defendants deny each and all the allegations contained in paragraph XIX and every subdivision thereof of complainants' bill.

XX.

The defendants admit that the Secretary of Agriculture has announced that he will not designate any exchange as a "contract market" under said The Grain Futures Act and will not permit any exchange to continue as a contract market thereunder unless such exchange shall adopt, maintain and enforce against its members the rule set out in paragraph XX of complainants' bill. Defendants admit that the Secretary of Agriculture has announced that he will enforce, as far as is incumbent upon him to do so, all the provisions of said The Grain Futures Act.

70 The defendants aver that the question concerning admission to membership of co-operative associations of producers under clause (e) of section V of said Act will not arise until an exchange refuses to comply therewith or until an association of producers coming within the provisions of said clause makes application and is denied the privileges sought thereunder.

The defendants admit the allegation that the defendant, Charles F. Clyne, as such District Attorney, will enforce all the provisions of said The Grain Futures Act so far as it is incumbent upon him to do so. The defendants, further answering said paragraph XX, deny

that the enforcement of said The Grain Futures Act will cause serious disturbance of the grain markets of the country and that many growers of grain will be deprived of the privilege of insuring themselves against price fluctuations through "hedging" contracts on such Exchange. The defendants further deny that thereby irreparable loss will be caused to complainants or the members of said Exchange.

The defendants further aver that The Future Trading Act of August 24, 1921, set forth conditions governing designation of exchanges as "contract markets" substantially similar to the conditions set forth in Section V of The Grain Futures Act; that under said The Future Trading Act all of the exchanges in the United States on which the defendants are informed and believe trading in grain futures is conducted, including those mentioned in paragraph 14 of complainants' bill; to wit, Minneapolis, Duluth, Kansas City, St. Louis, and Toledo, Ohio, applied for and received from the Secretary of Agriculture designations as "contract markets," including the Chicago Board of Trade except that the designation in the case of the Chicago Board of Trade was partially limited by a restraining order issued by the Supreme Court of the United States during the pendency of the litigation to test the constitutionality of said Act referred to in complainants' bill.

71 The defendants further aver that under the Grain Futures Act of September 21, 1922, four of the same exchanges that received designations as "contract markets" under The Future Trading Act of August 24, 1921; to wit, exchanges located at Los Angeles, San Francisco, and Milwaukee, and the Open Board of Trade of Chicago, again applied for and received designations as "contract markets" and that no application for designation has been made by any other exchange or denied by the Secretary of Agriculture.

The defendants aver that compliance by the exchanges with the requirements of The Grain Futures Act, all of which are reasonable, will restore confidence to producers and others interested in the grain trade and the public generally and will stabilize the grain industry and encourage the use of the grain exchanges for the accomplishment of their economic purposes.

XXI.

The defendants admit the allegation as to the amount in controversy contained in paragraph XXI of complainants' bill.

XXII.

The defendants further answering complainants' bill, deny that the complainants have set forth facts sufficient to entitle them to either a temporary or permanent injunction, as prayed for in said bill.

that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in, or have the effect of causing, the prices of grain to be abnormally depressed, nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

JAMES E. BOYLE.

Subscribed and sworn to before me, this 27th day of October, 1922.

[SEAL.]

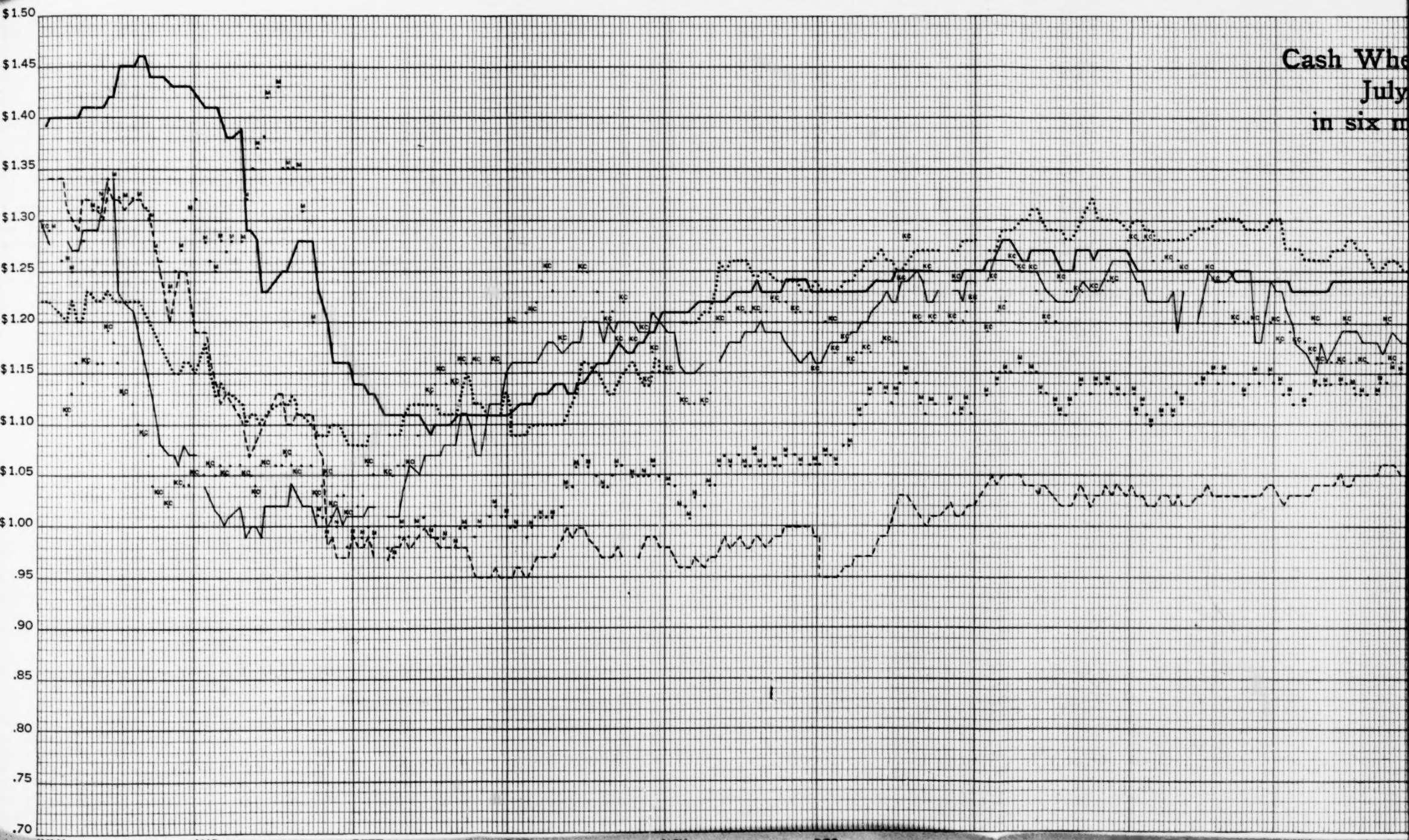
JOHN G. GUDMUNDSEN,
Notary Public.

77 EXHIBIT A TO THE AFFIDAVIT OF JAMES E. BOYLE,

Being a Chart of Wheat Prices Daily for Five Years from July 1, 1909, to June 30, 1914, in Chicago, Liverpool, New York, Winnipeg, Minneapolis and Kansas City.

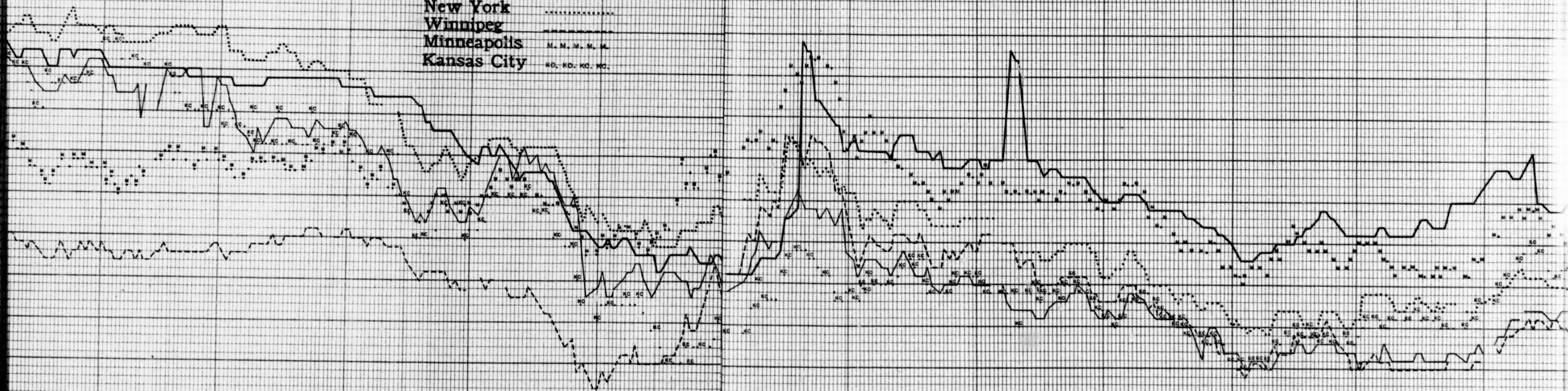
(Here follows said exhibit.)

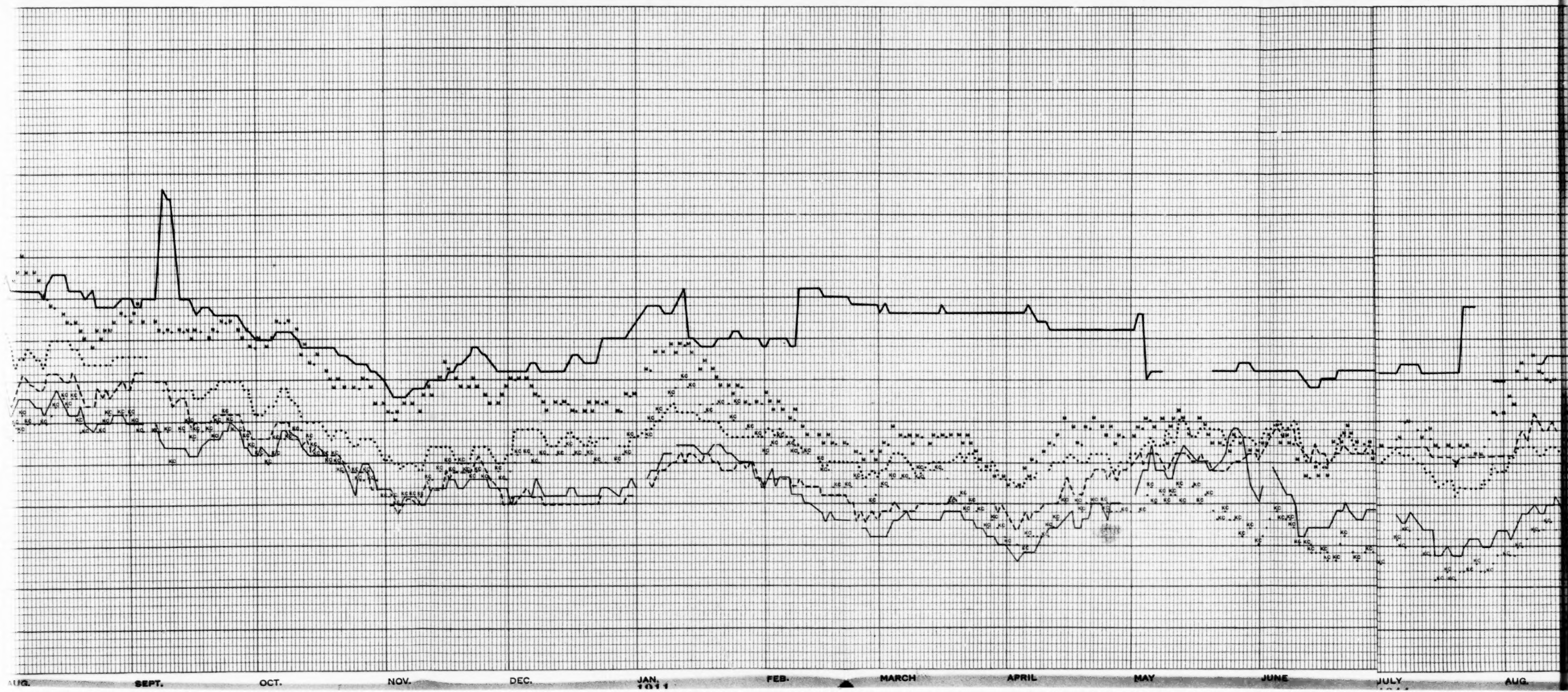
Cash Wheat
July
in six months

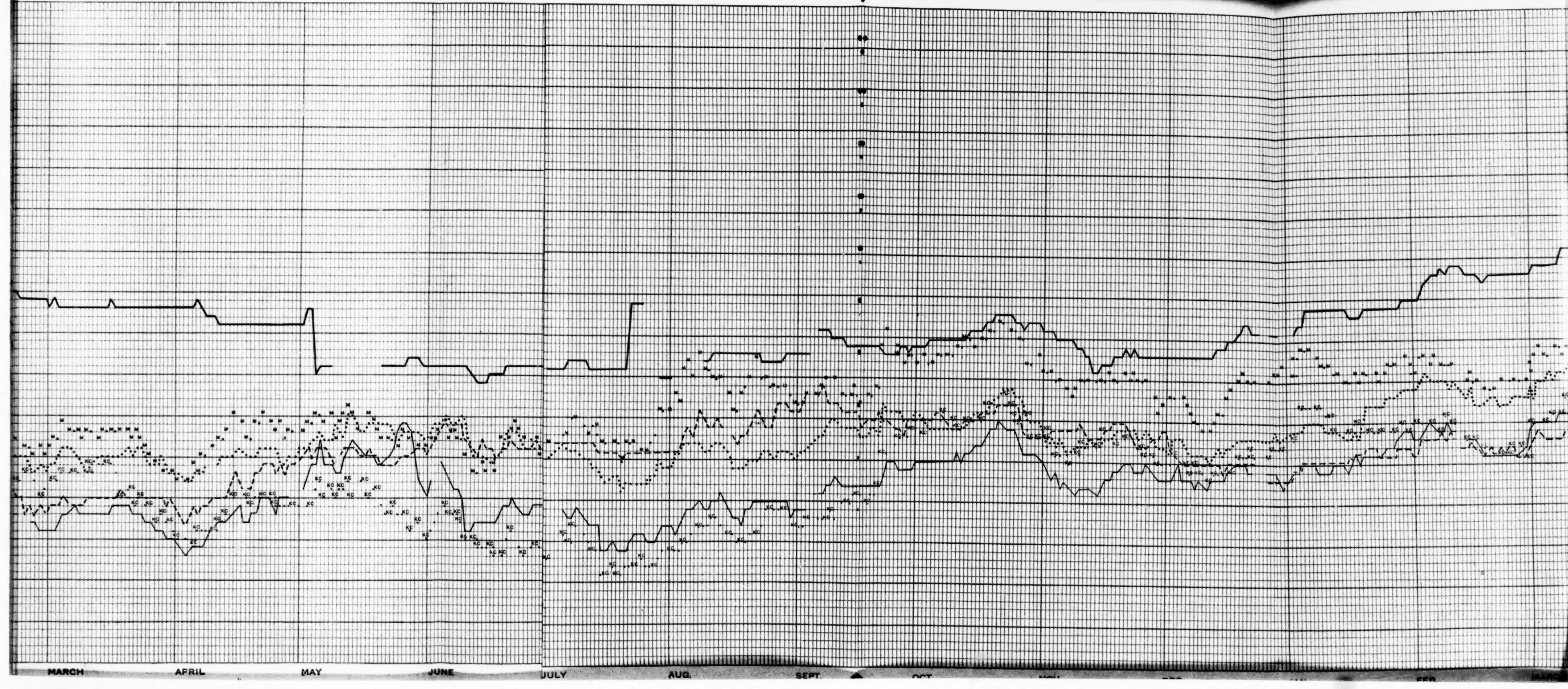


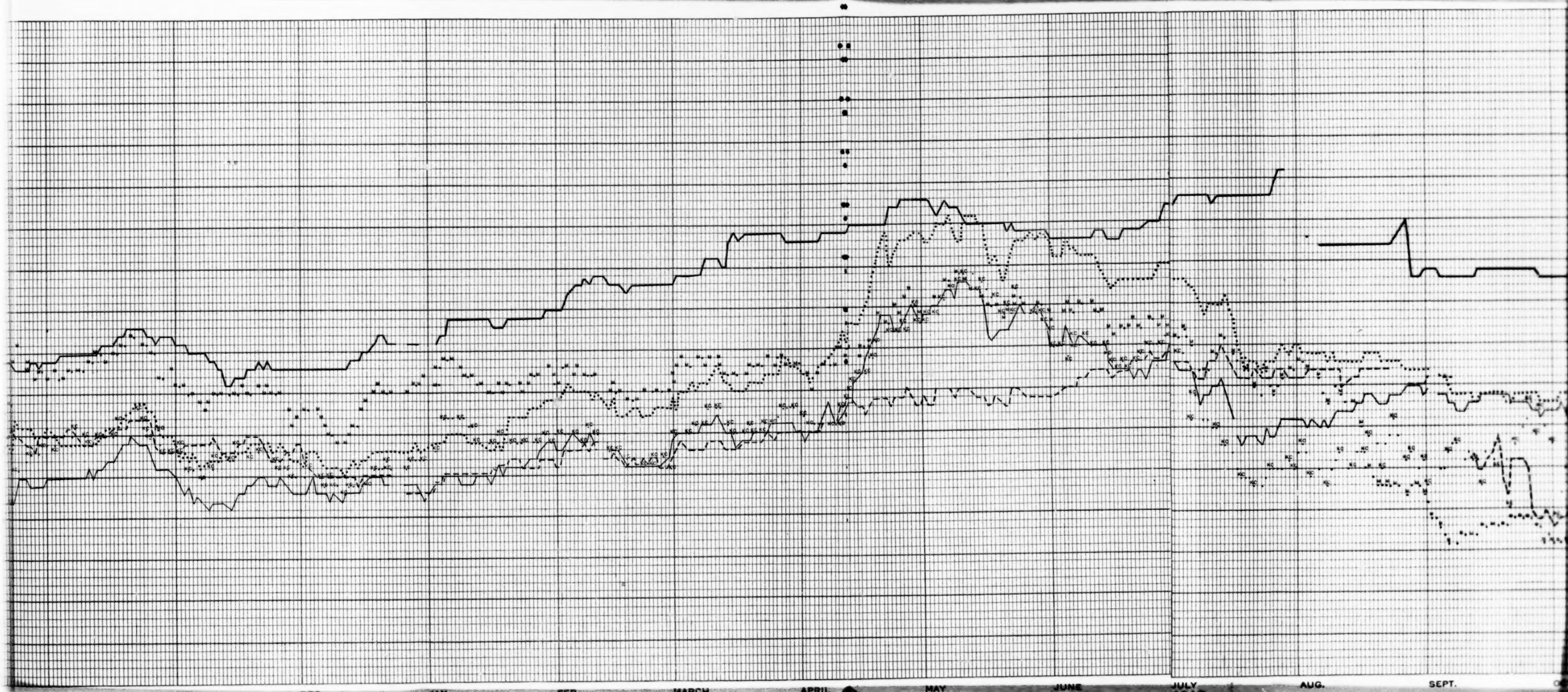
Cash Wheat Prices Daily, for five years,
 July 1, 1909 — June 30, 1914,
 in six markets:—

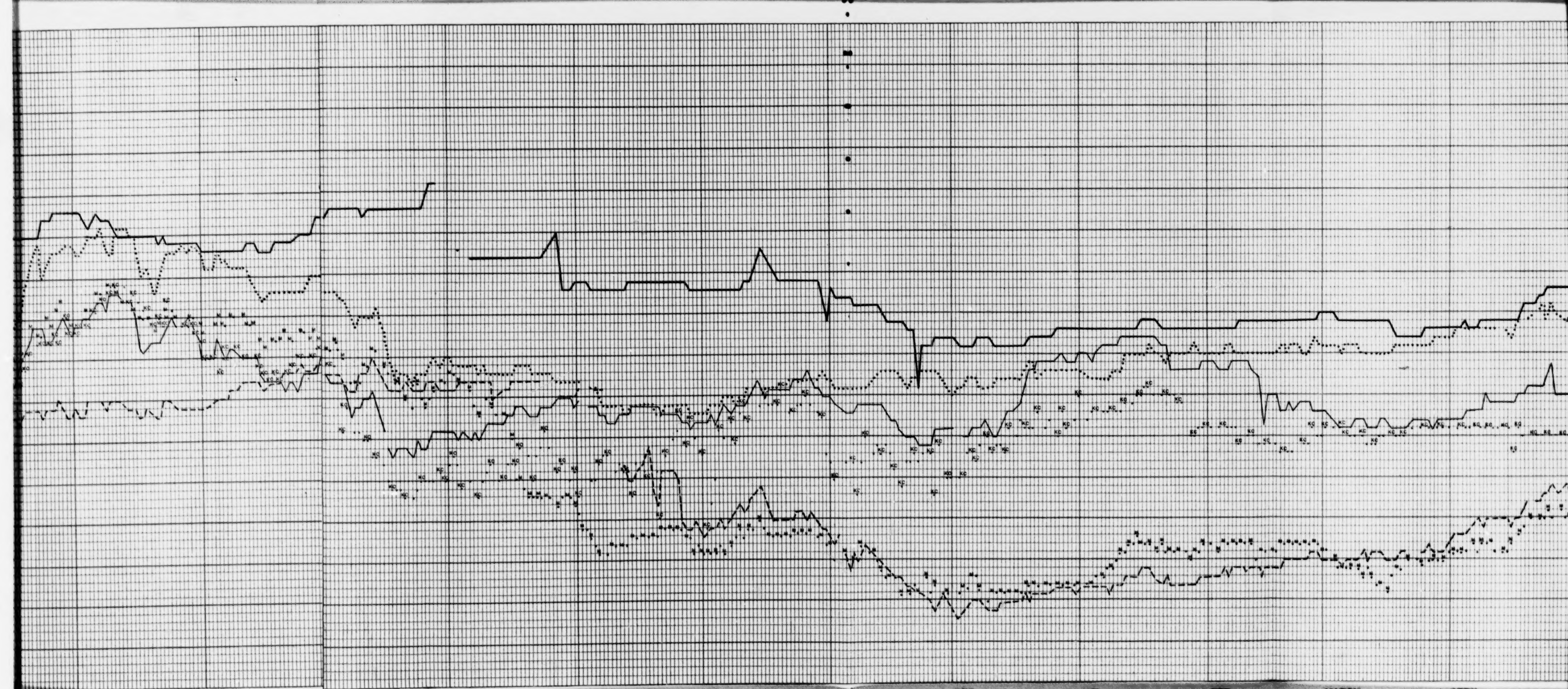
Chicago —————
 Liverpool —————
 New York
 Winnipeg —————
 Minneapolis M. M. M. M. M.
 Kansas City KC. KC. KC. KC.

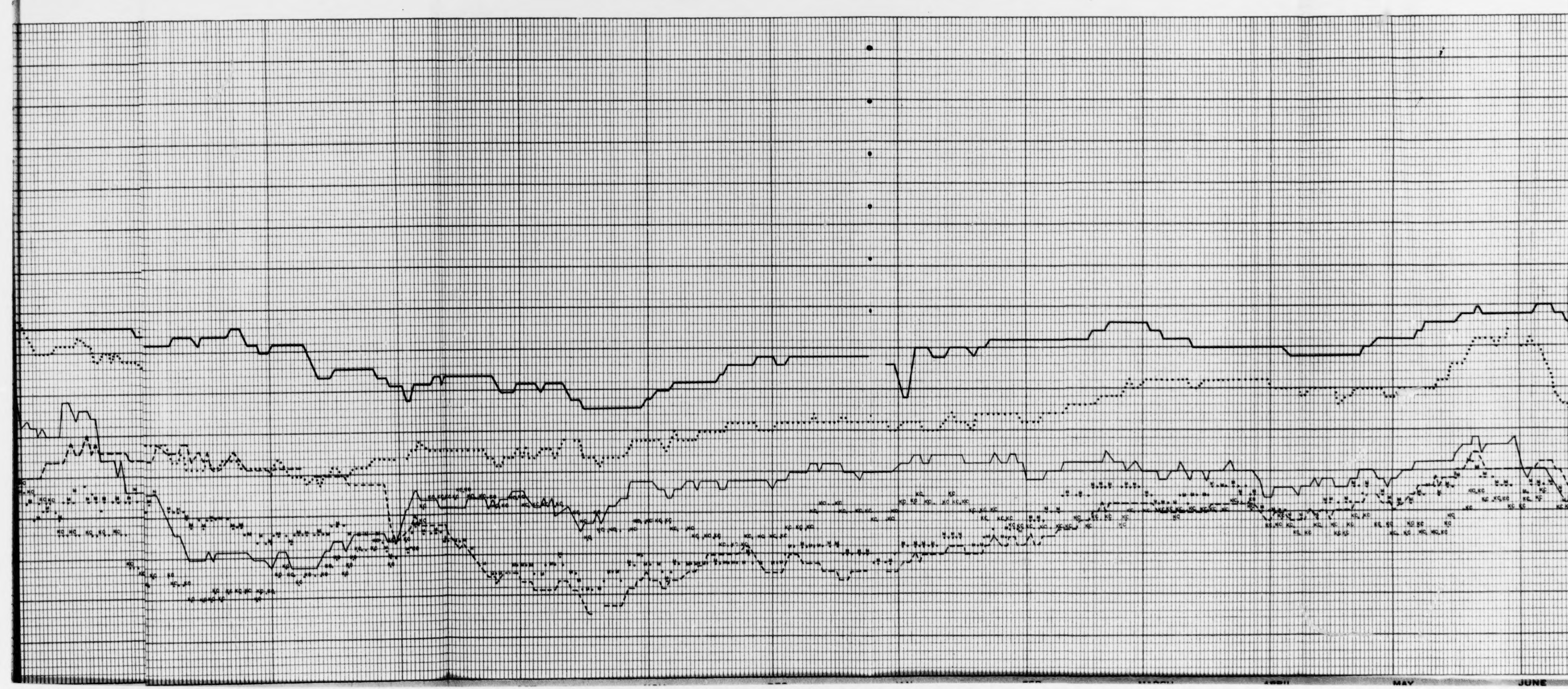


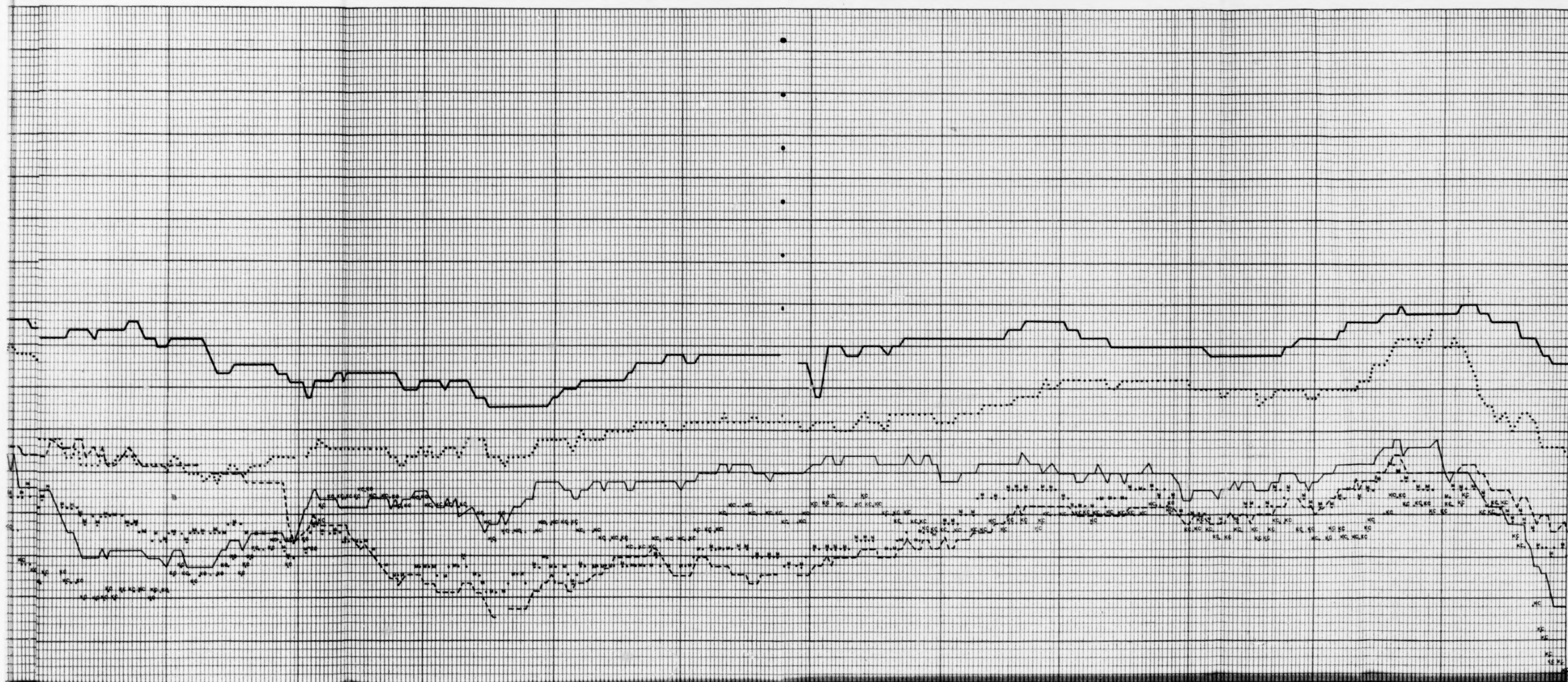












78 EXHIBIT B TO THE AFFIDAVIT OF JAMES E. BOYLE.

Explanatory of Wheat Price Chart, Exhibit A.

Average Annual Freight Rates and Other Charges on Wheat Exported from Chicago to Liverpool via New York July 1, 1909-June 30, 1914.

Miscellaneous Charges July 1, 1909-June 30, 1914.

Chicago elevation, lake, and rail.	Lake marine insurance.	Chicago weighing and inspection.	Shrinkage on rail shipment.	New York charges.
½c. per bu.	30c. per \$100, Ap. 15-Aug. 31. 45c. per \$100, Sep. 1-Nov. 30.	½c. per bu.	⅛ c. per bu.	New York fobbing, 5/8c. per bu. New York elevation, ⅛c. per bu. Trimming the load, \$1.50 per 1,000 bu. New York inspection, 25c. to 40c. per 1,000 bu. Total average of N. Y. Charges, 9/10c. per bu.

Freight Rates, Chicago to New York, 1909-1914.

	Lake and canal.	Lake and rail.	All rail
1909	5.35c. per bu.	6.88c. per bu.	11.70c. per bu.
1910	5.10	6.54	9.60
1911	5.37	5.23	9.60
1912	5.57	6.42	9.60
1913	5.70	6.81	9.60
1914	5.31	6.54	9.60

Marine Insurance, New York to Liverpool, 1909-1914, 25¢ to 30¢ per \$100.

Ocean Freight Rates, New York to Liverpool, 1909-1914, Cents per Bu.

	Low.	High.	Average.
July 1-Dec. 31, 1909	3	5	3¼
Jan. 1-Dec. 31, 1910	2	4½	3
Jan. 1-Dec. 31, 1911	2½	7	4
Jan. 1-Dec. 31, 1912	4	11	7¾
Jan. 1-Dec. 31, 1913	3½	9	5¾
Jan. 1-June 30, 1914	2½	4	3

79 *Average Annual Freight Rates and Other Charges on Wheat Shipped from Winnipeg to Liverpool July 1, 1909-June 30, 1914.*

Freight rates:

Winnipeg to Fort William, Ontario, 1909-1914, 6 cents per bu.
 Fort William to Montreal, 1909-1911, 15 cents per bu.
 1912-1914, 13.8 cents per bu.

Montreal charges:

Fobbing, 9/10 cents per bu., of which shipper pays $\frac{1}{2}$ cent.
 Wharfage, 3 cents per 2,000 pounds.

Average total of Montreal charges..... $\frac{5}{8}$ cents.

Ocean Rates, Montreal to Liverpool, Cents per Bu.

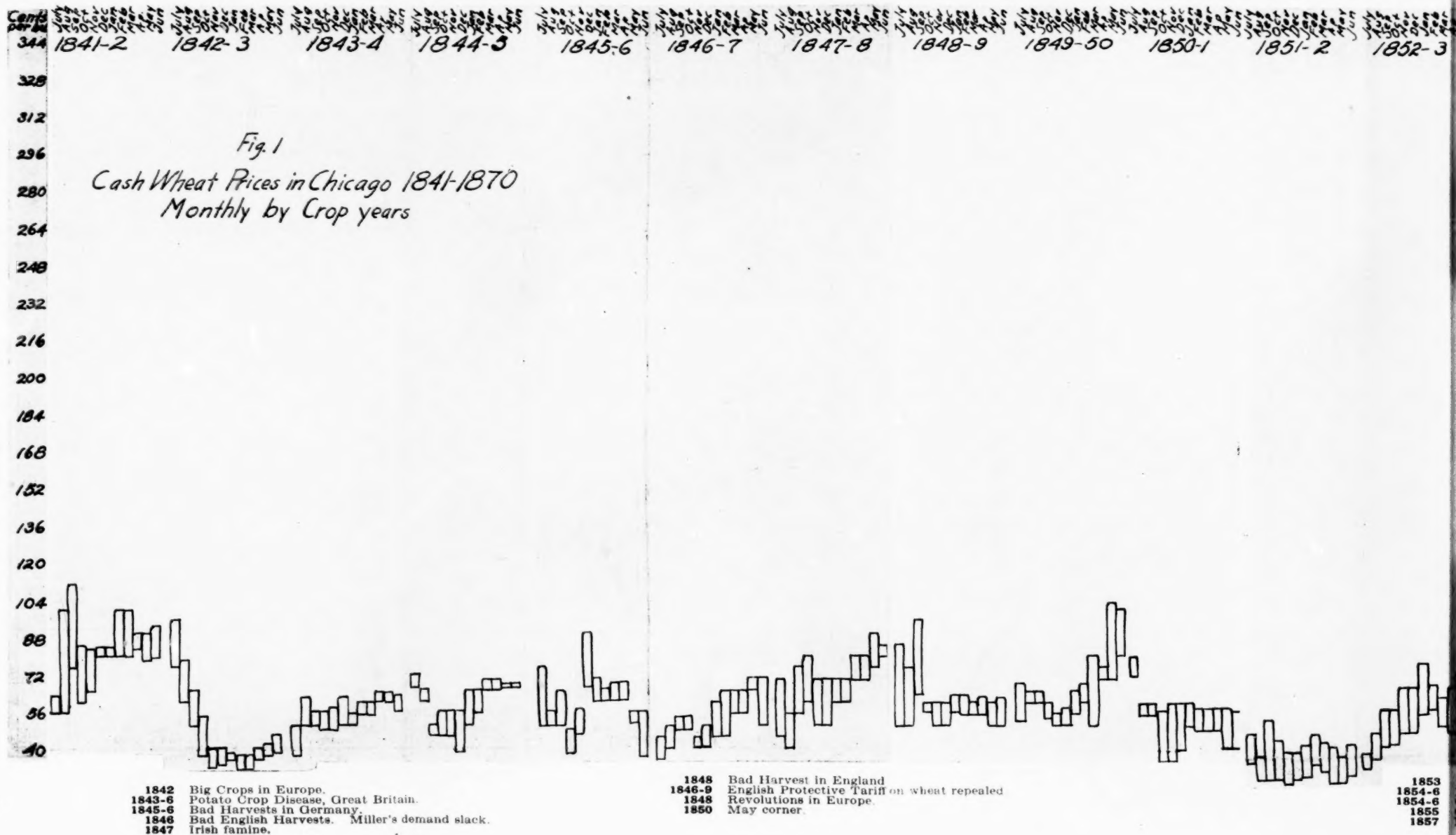
Season.	Low.	High.	Average.
July-Nov., 1909.....	2 $\frac{1}{4}$	6	4
May-Nov., 1910.....	1 $\frac{7}{8}$	5 $\frac{1}{4}$	3 $\frac{1}{2}$
May-Nov., 1911.....	3 $\frac{3}{4}$	7 $\frac{1}{4}$	4 $\frac{5}{8}$
May-Nov., 1912.....	4 $\frac{1}{2}$	12 $\frac{3}{4}$	7 $\frac{3}{8}$
May-Nov., 1913.....	6	9	7 $\frac{5}{8}$
May-June, 1914.....	3 $\frac{3}{4}$	6	4 $\frac{7}{8}$

Marine Insurance, Montreal to Liverpool, Summer Seasons, Cents per \$100.

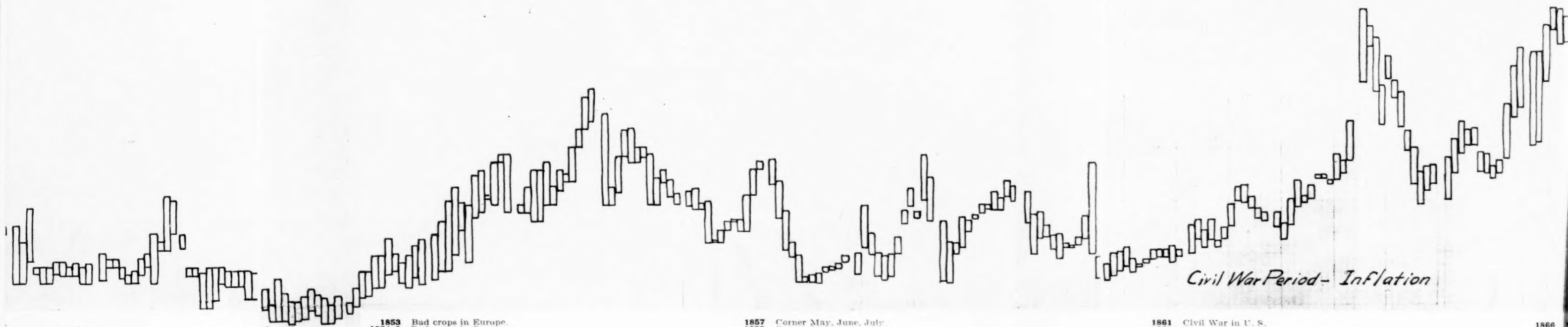
1909. Opening to Oct. 15.. 27 $\frac{1}{2}$	1912. Opening to Oct. 15.. 20
Oct. 16-31..... 32 $\frac{1}{2}$	Oct. 16-31..... 25
Nov. 1-15..... 37 $\frac{1}{2}$	Nov. 1-15..... 30
Nov. 15 to close.... 40	Nov. 15 to close.... 32 $\frac{1}{2}$
1910. Opening to Oct. 15.. 27	1913. Opening to Oct. 15.. 20
Oct. 16-31..... 32	Oct. 16-31..... 25
Nov. 1-15..... 37	Nov. 1-15..... 30
Nov. 15 to close.... 39 $\frac{1}{2}$	Nov. 15 to close.... 32 $\frac{1}{2}$
1911. Opening to Oct. 15.. 25	1914. Opening to Oct. 15.. 20
Oct. 16-31..... 30	Oct. 16-31..... 25
Nov. 1-15..... 35	Nov. 1-15..... 30
Nov. 15 to close.... 37 $\frac{1}{2}$	Nov. 15 to close.... 32 $\frac{1}{2}$

80 *Average Annual Freight Rates on Wheat, July 1, 1909-June 30, 1914.*

Buffalo to New York.....	8.1 cents per bu.
Winnipeg to Minneapolis.....	7.2
Minneapolis to Chicago.....	6
Kansas City to Chicago.....	7.2



1848-9 1849-50 1850-1 1851-2 1852-3 1853-4 1854-5 1855-6 1856-7 1857-8 1858-9 1859-60 1860-1 1861-2 1862-3 1863-4 1864-5 1865-6 1866



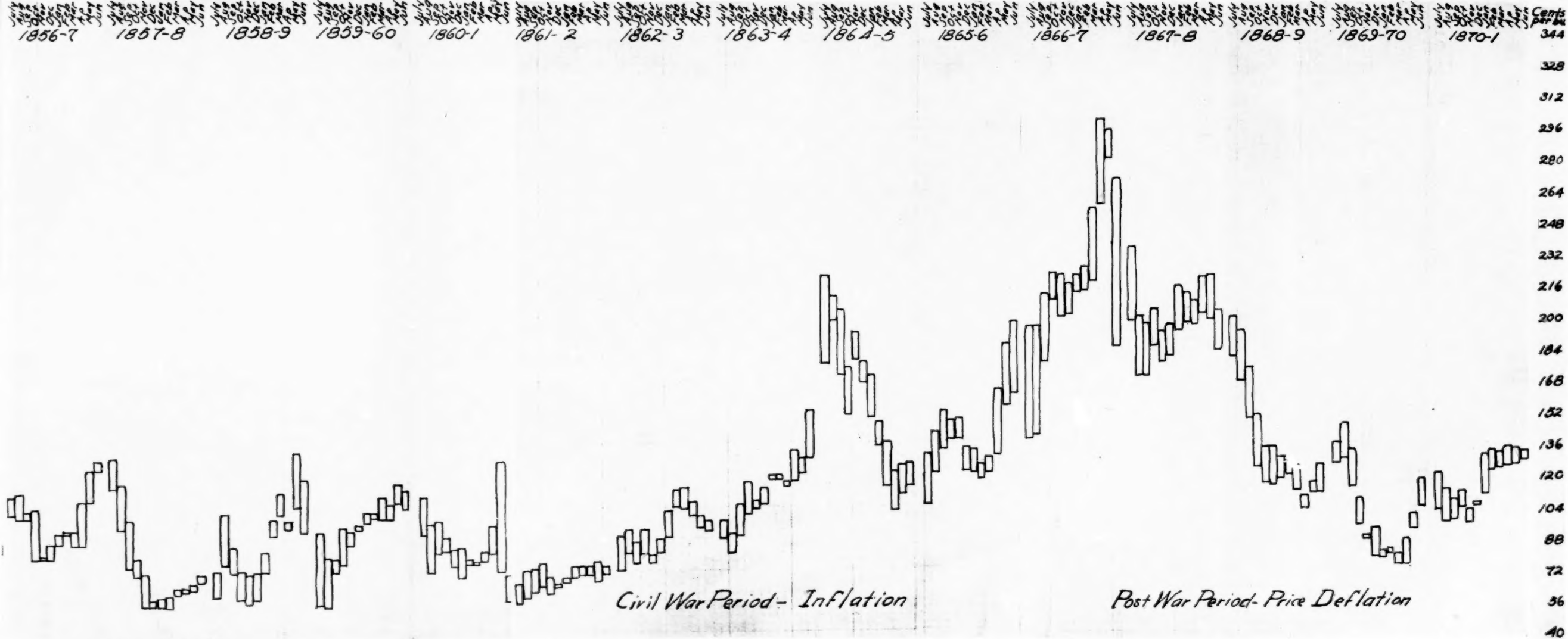
on wheat repealed

1853 Bad crops in Europe.
1854-6 Bad crops in Germany.
1854-6 Crimean War.
1855 Corner May, June, July.
1857 Indian Mutiny

1857 Corner May, June, July.
1858 Corner August.
1859 Italian War.
1859 Corner May, June.

1861 Civil War in U. S.
1861 Corner May.
1862 Commercial panic.
1863 Large Harvest in England. Polish insurrection.
1864 Corner July, English drouth, Schleswig Holstein War.
1865 Wet English summer. Cattle Plague

1866
1866-8
1867
1869
1870
1870-1



1857 Corner May, June, July
 1858 Corner August
 1859 Italian War
 1859 Corner May, June

1861 Civil War in U. S.
 1861 Corner May.
 1862 Commercial panic.
 1863 Large Harvest in England. Polish insurrection.
 1864 Corner July, English drouth, Schleswig Holstein War.
 1865 Wet English summer. Cattle Plague

1866 Wet English harvest. Austro-Prussian War. Austro-Italian War.
 1866-8 Poor French Crops.
 1866-8 Bad German harvests.
 1867 English drouth; large crops. Corner April, May.
 1869 Suez canal opened.
 1870 Large English crop.
 1870-1 Franco-Prussian War.

Chicago Wheat Prices 1871-1921

Cash prices - high and low
Futures - high only

WEEKLY CASH FLUCTUATIONS

No 2 SPRING

1871

1872

1873

1874

1875

1876

JAN
1877

FEB

MAR

APR

MAY

JUN

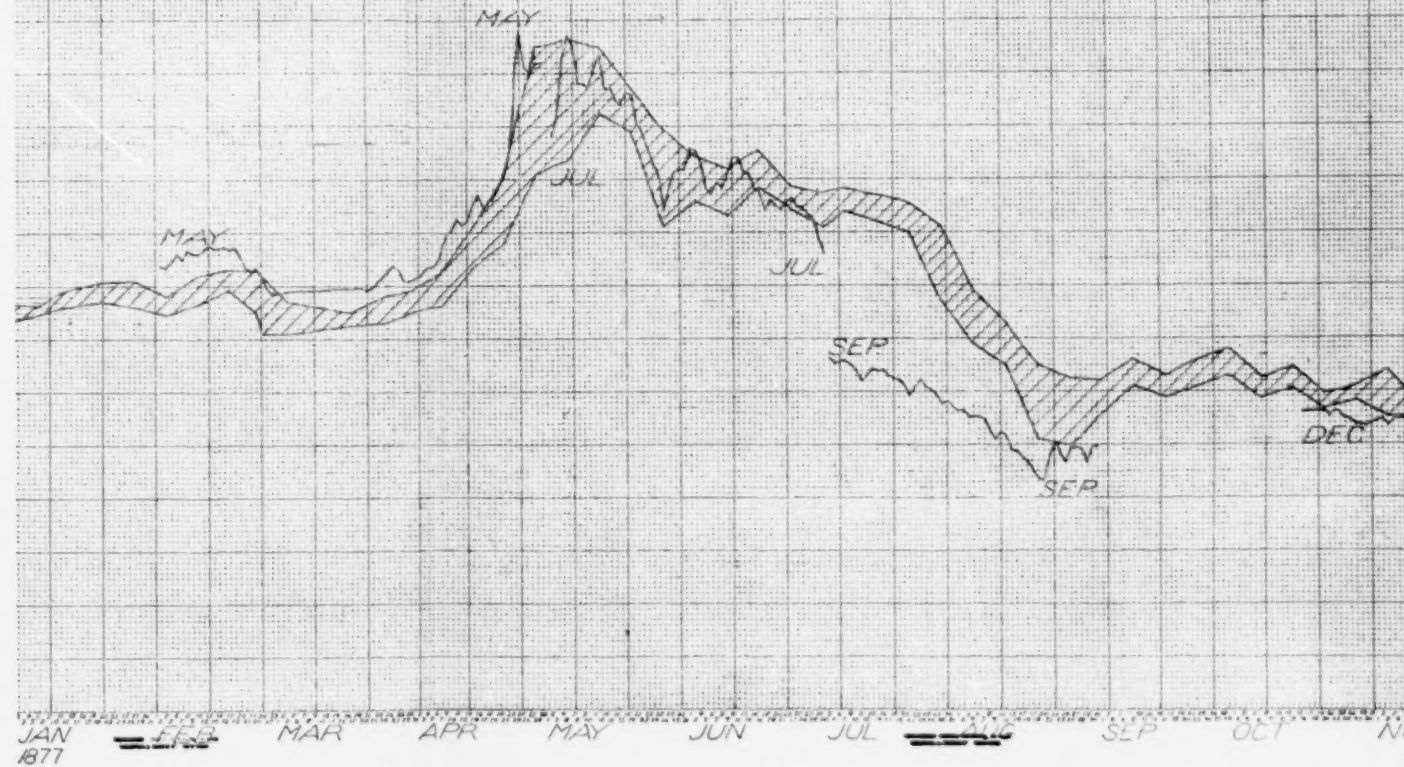
JUL

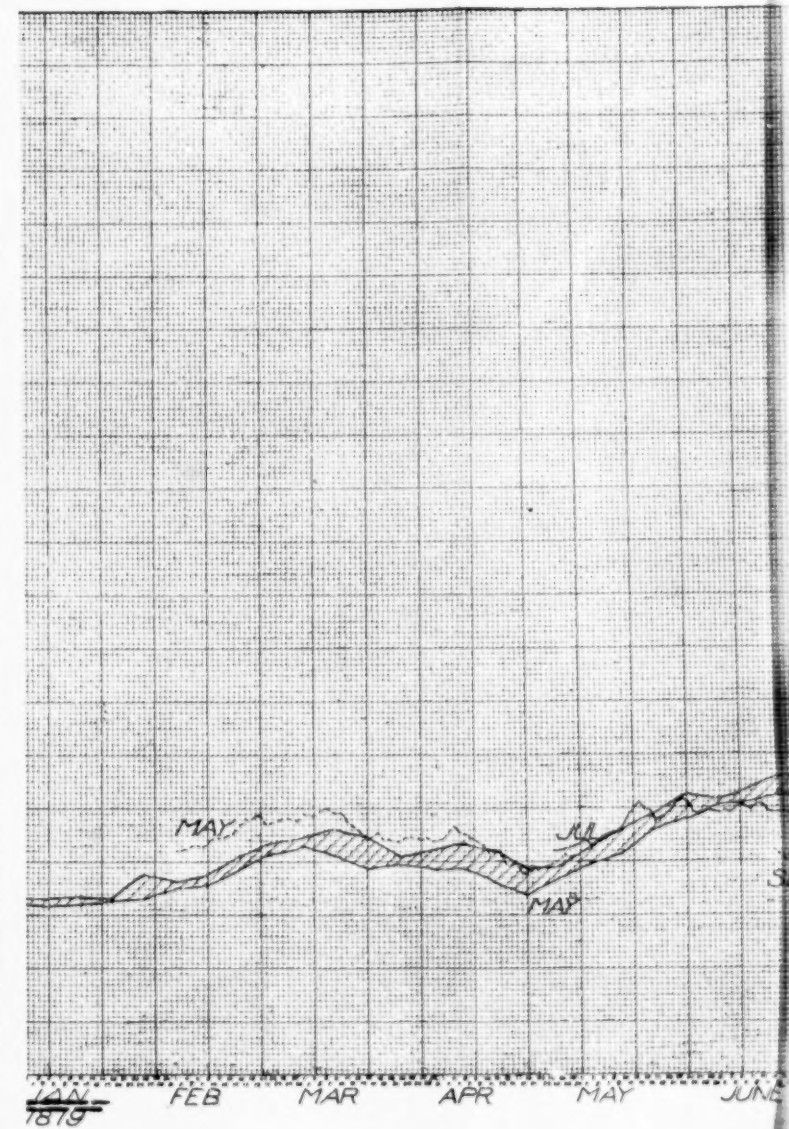
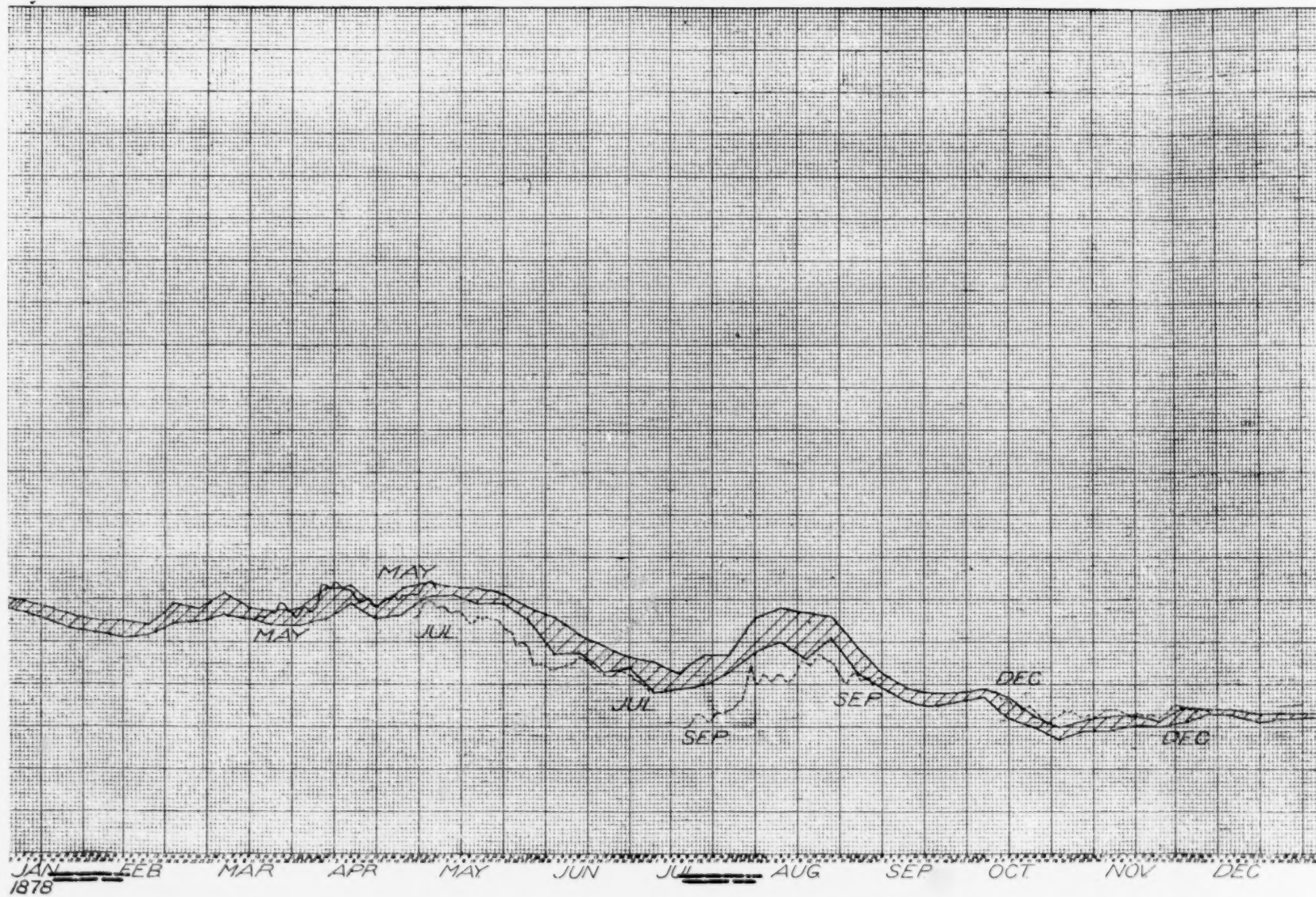
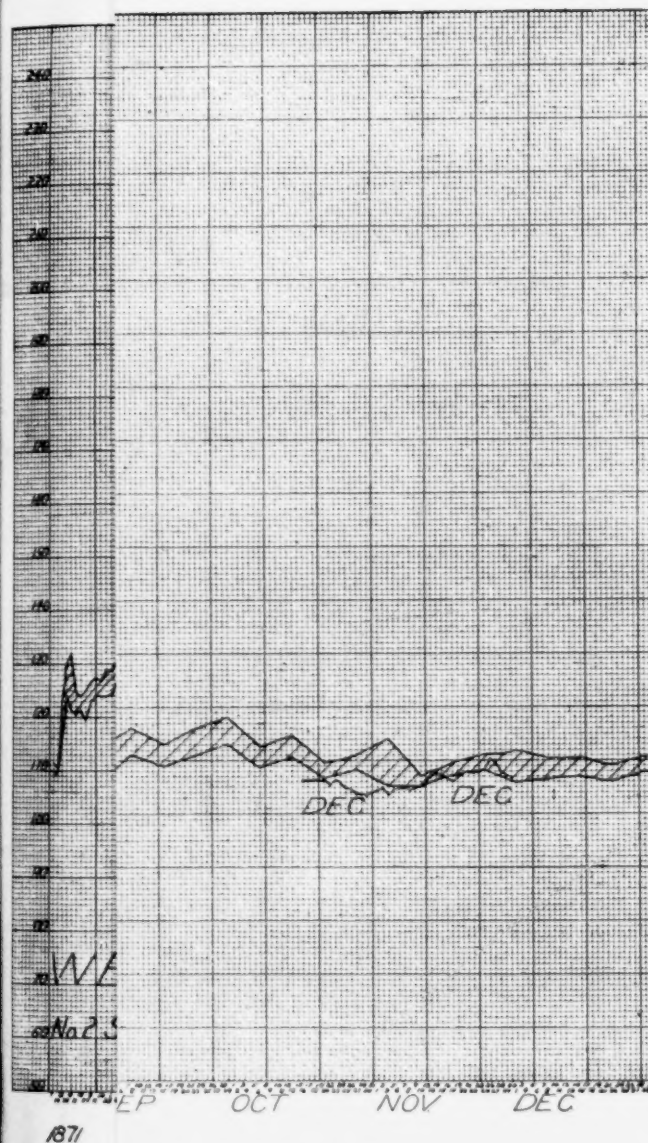
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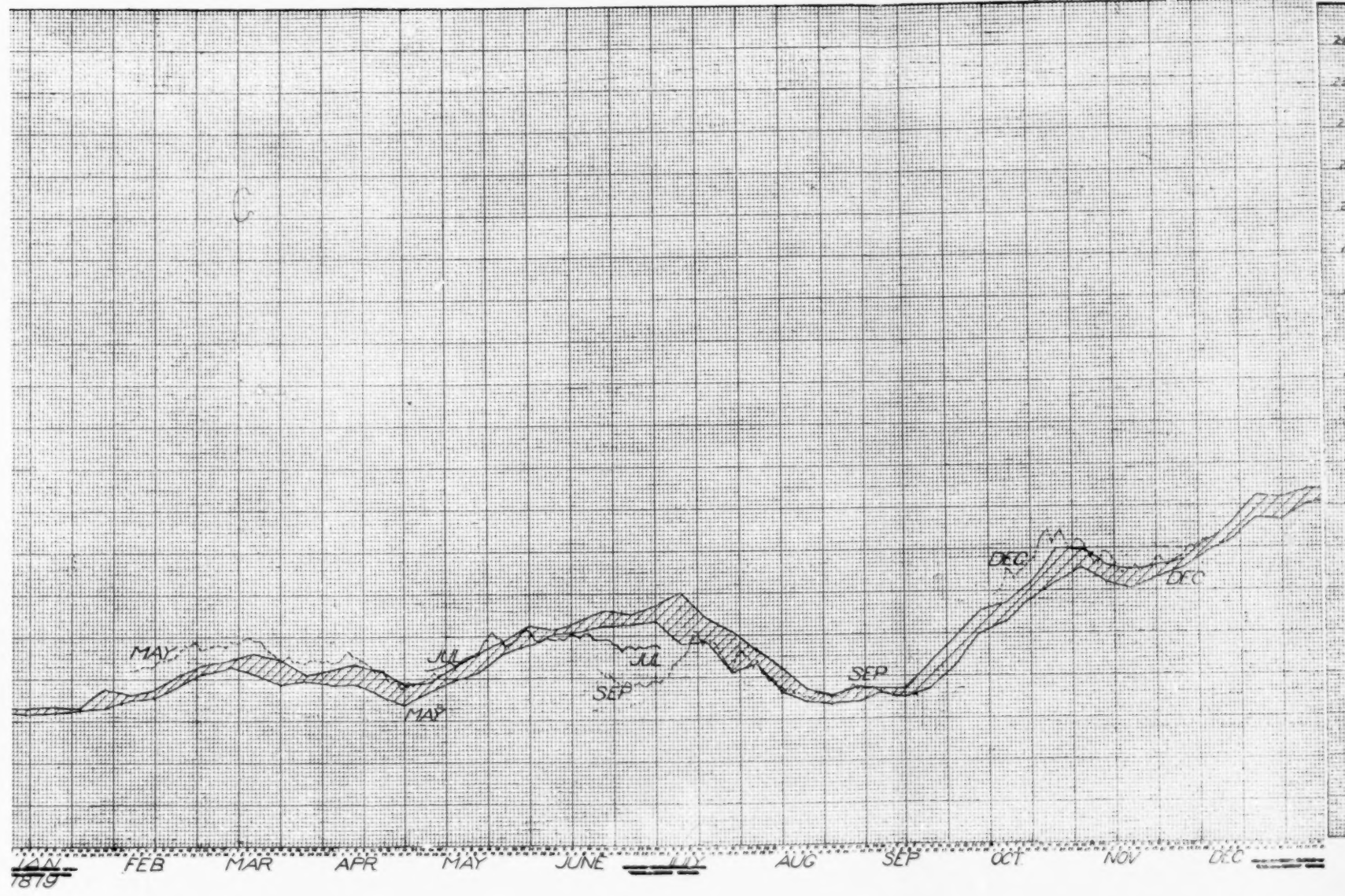
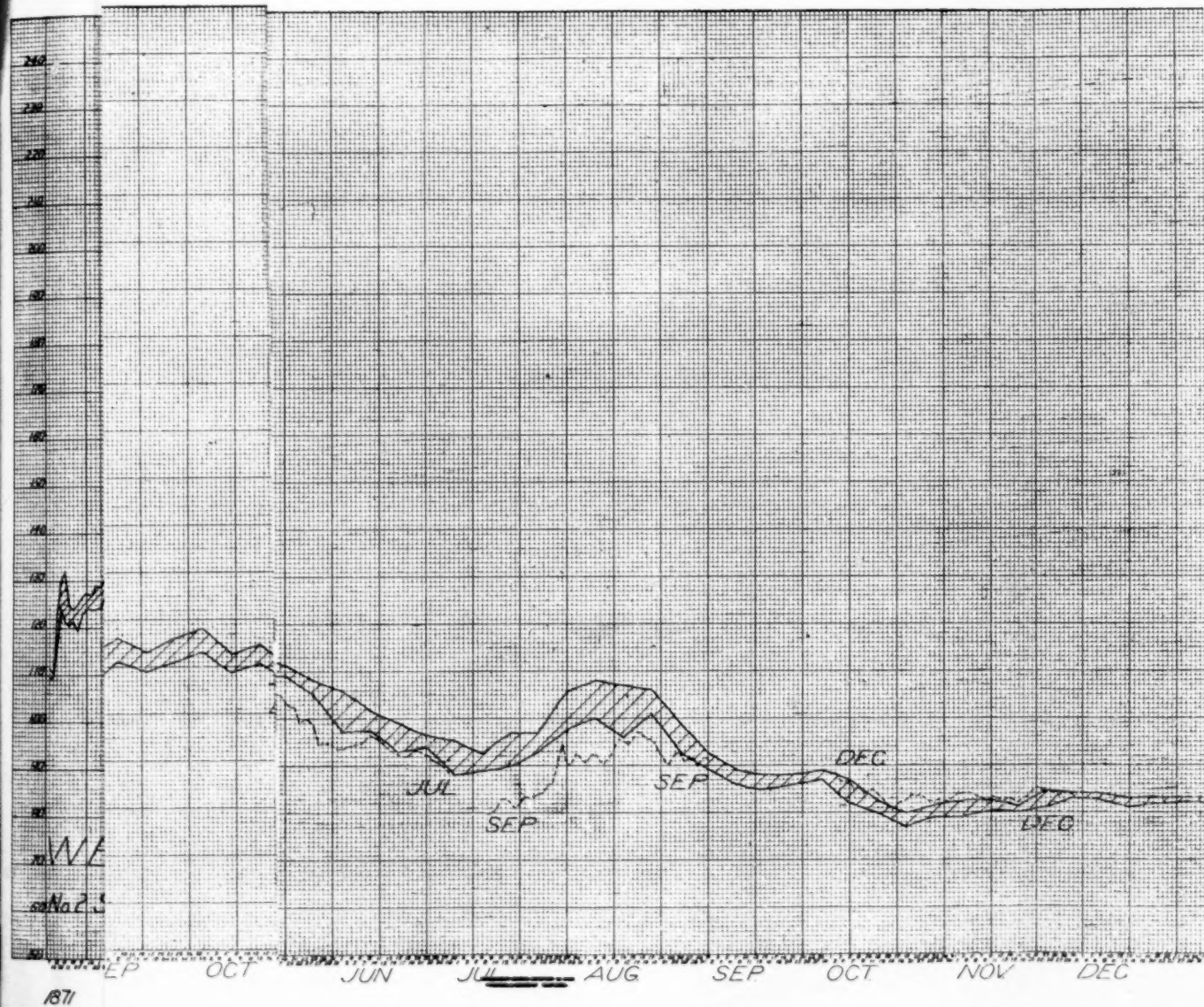
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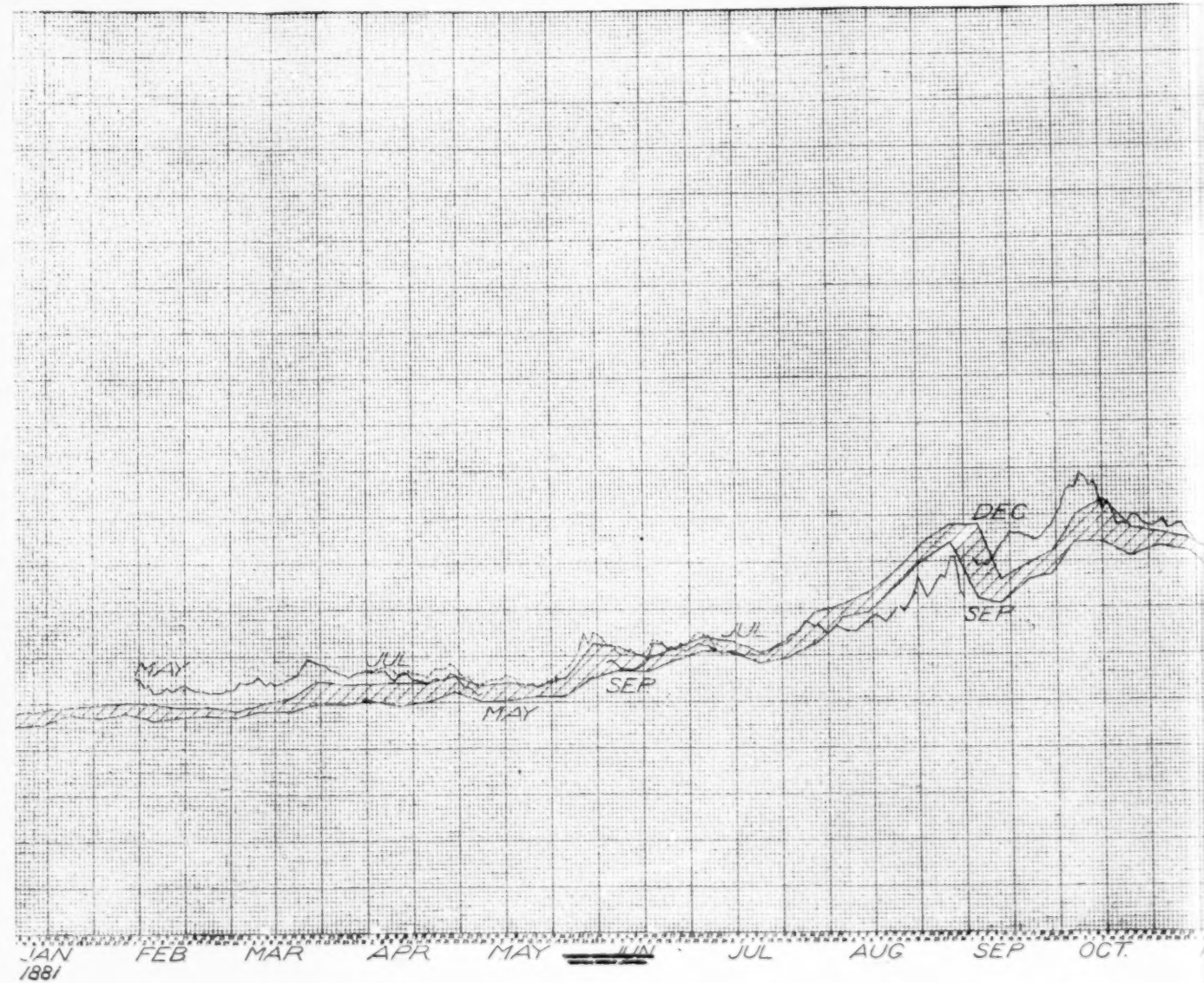
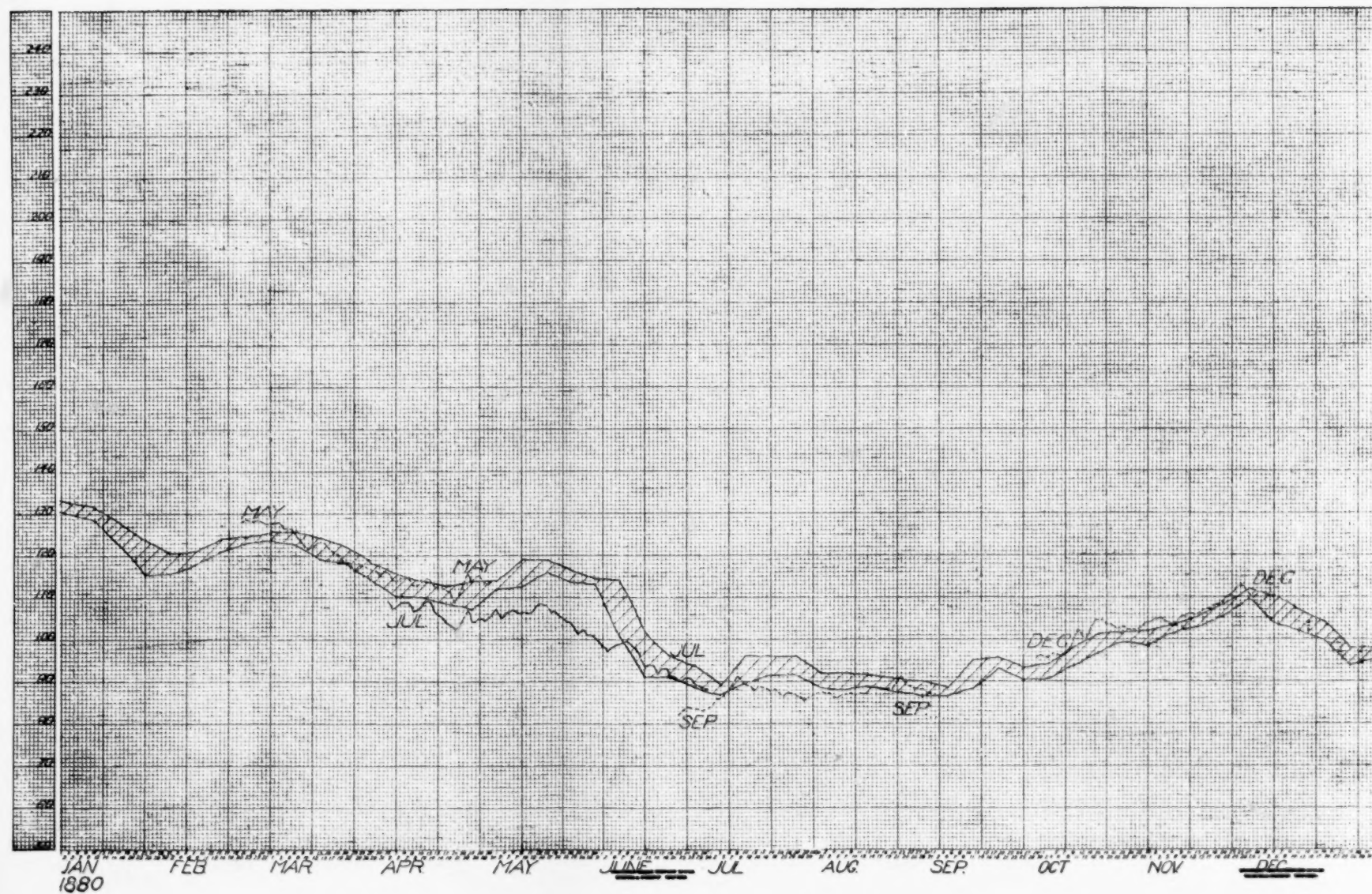
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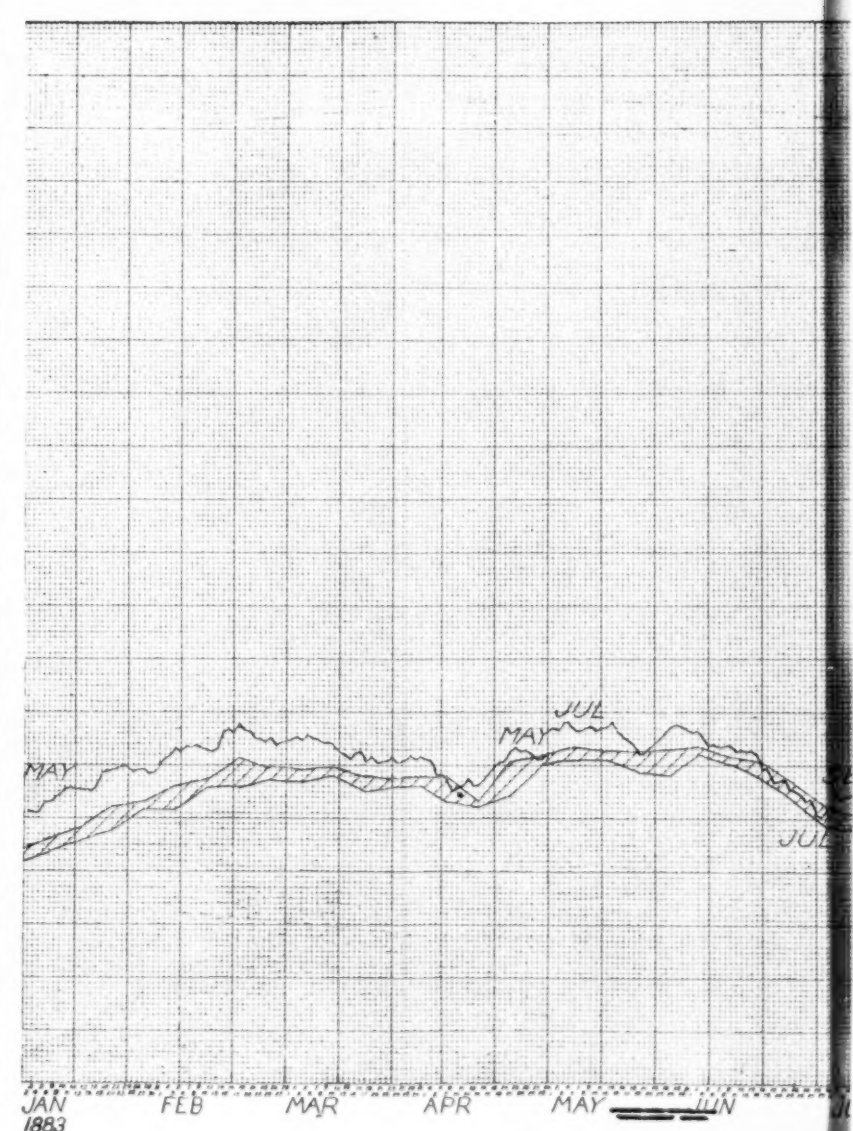
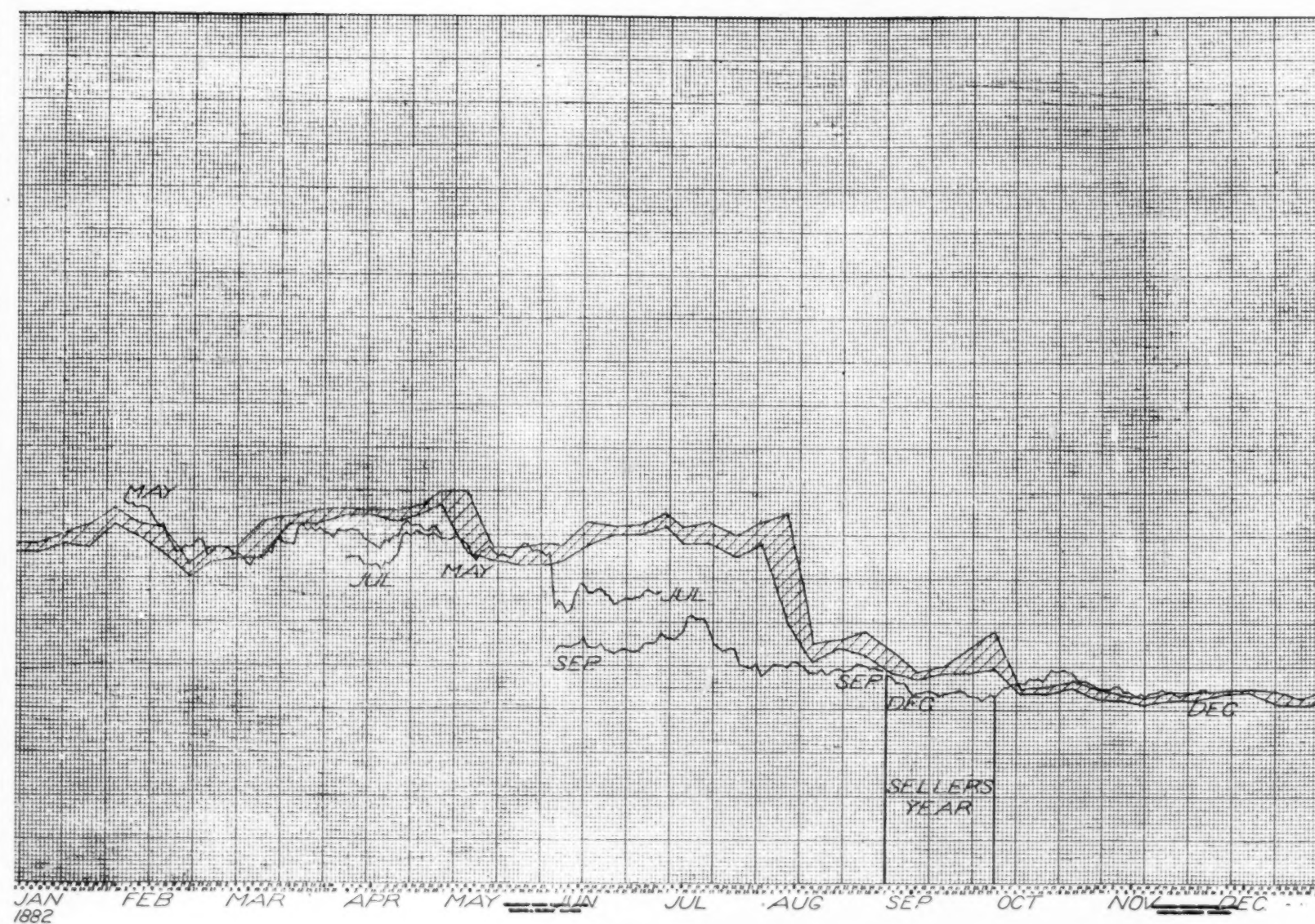
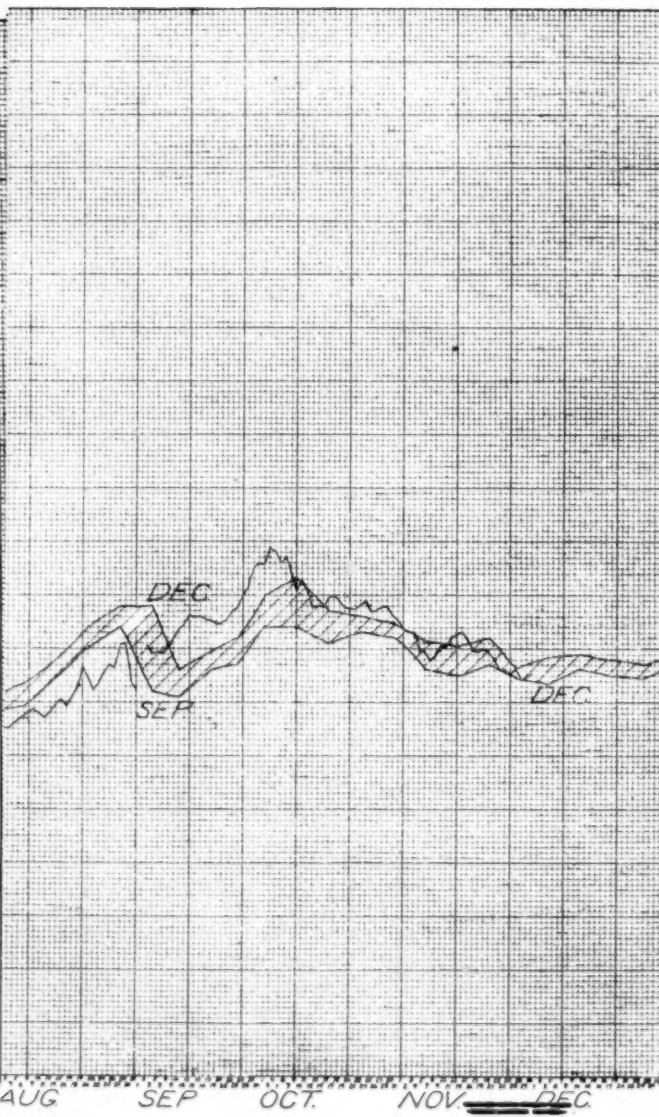
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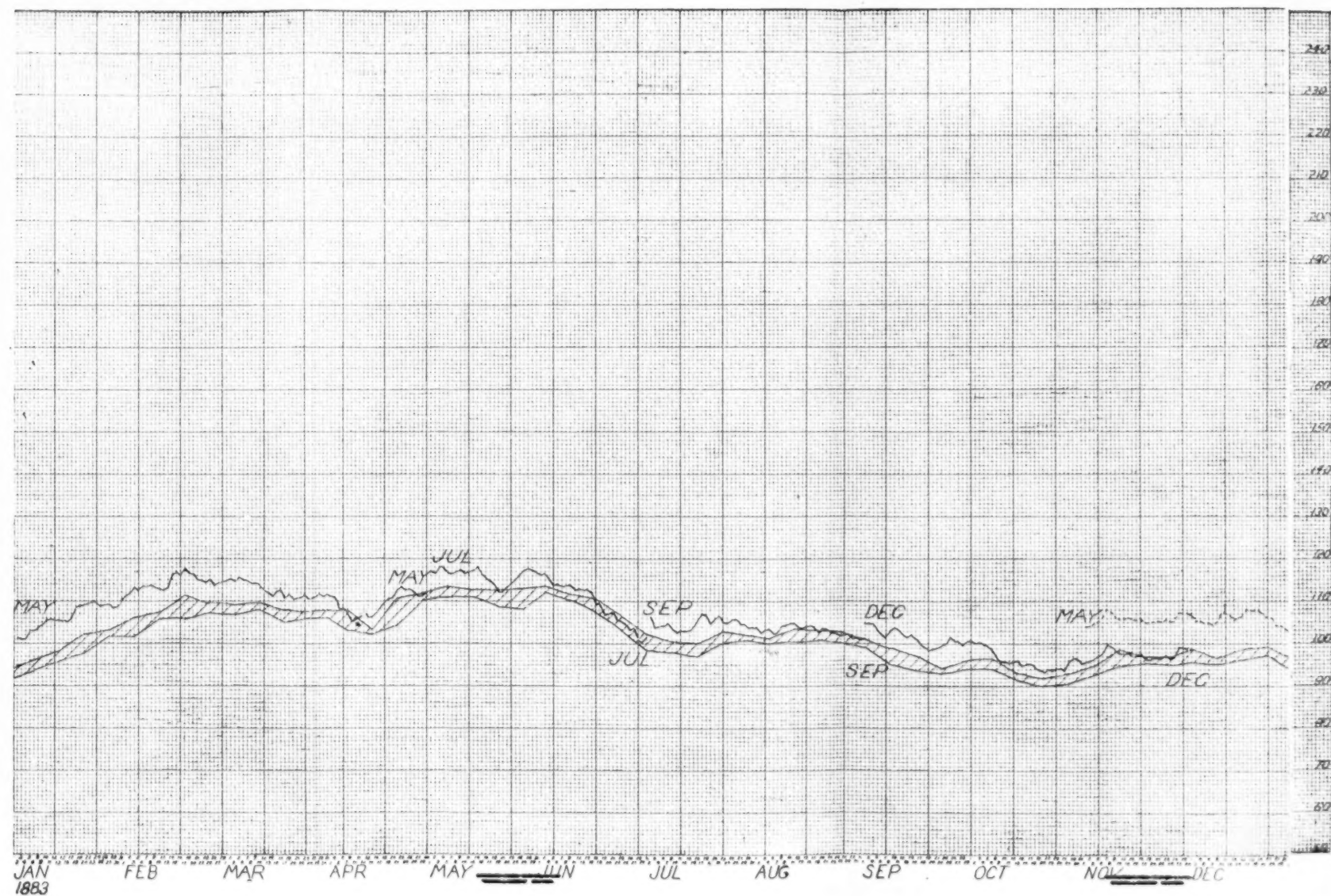
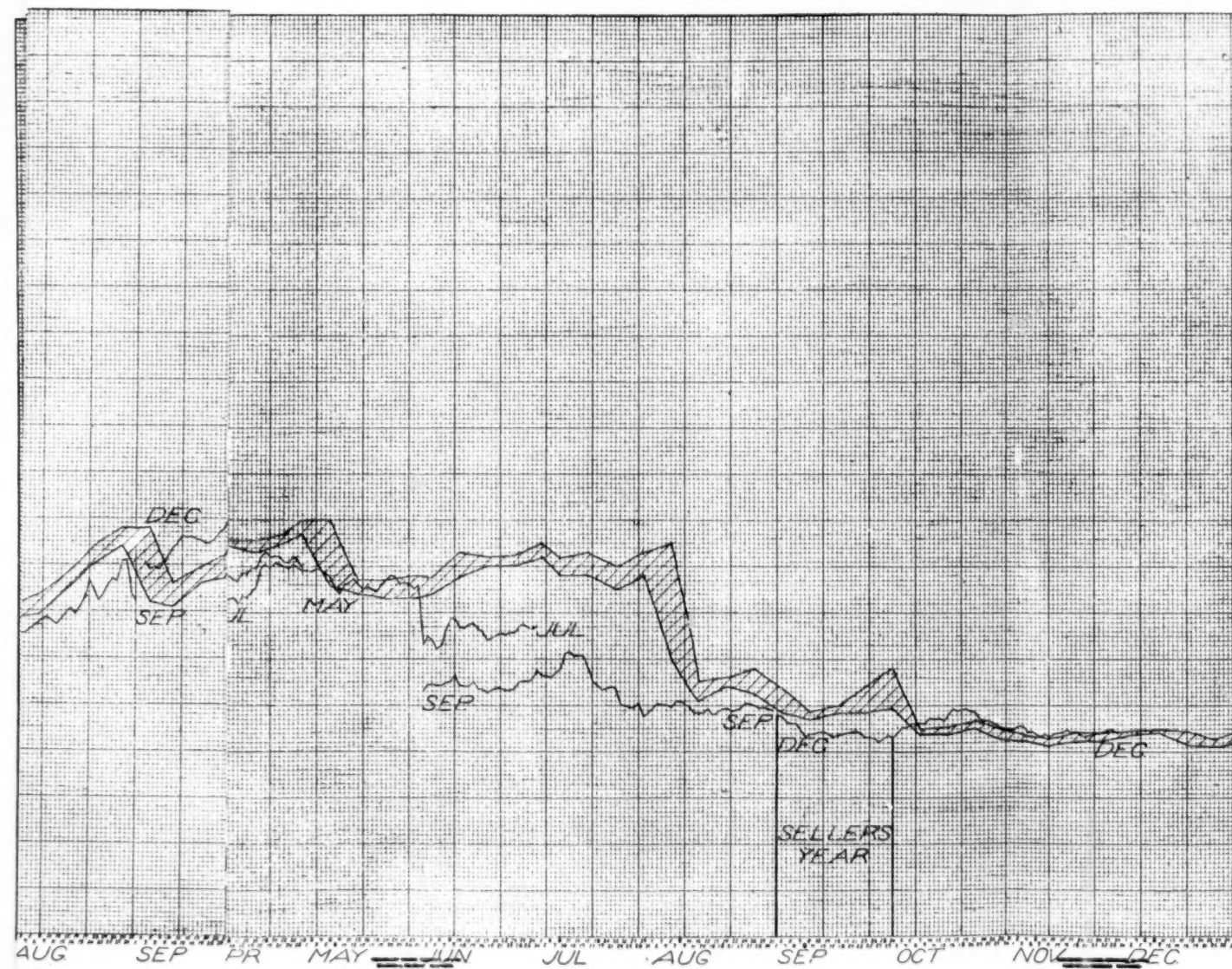


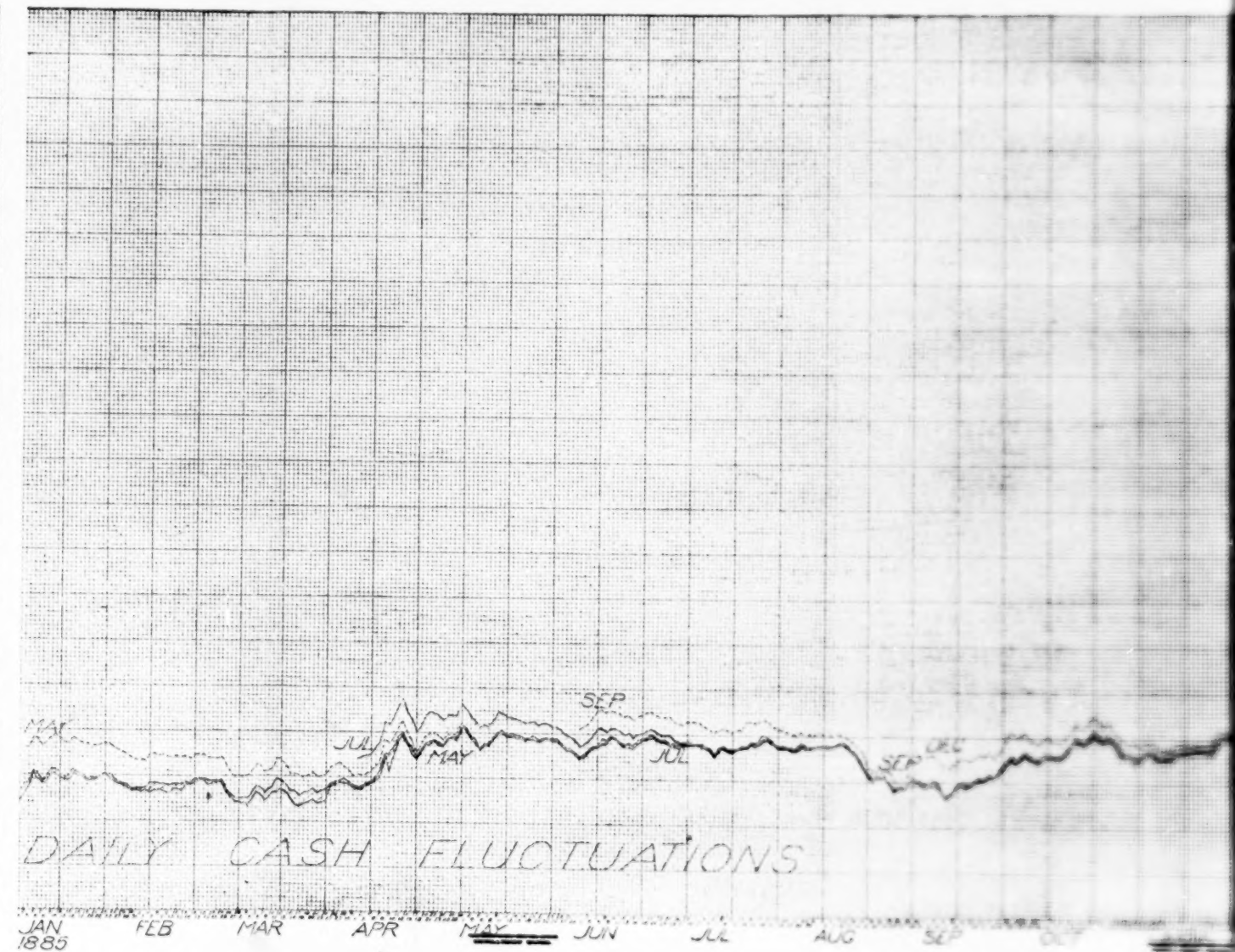
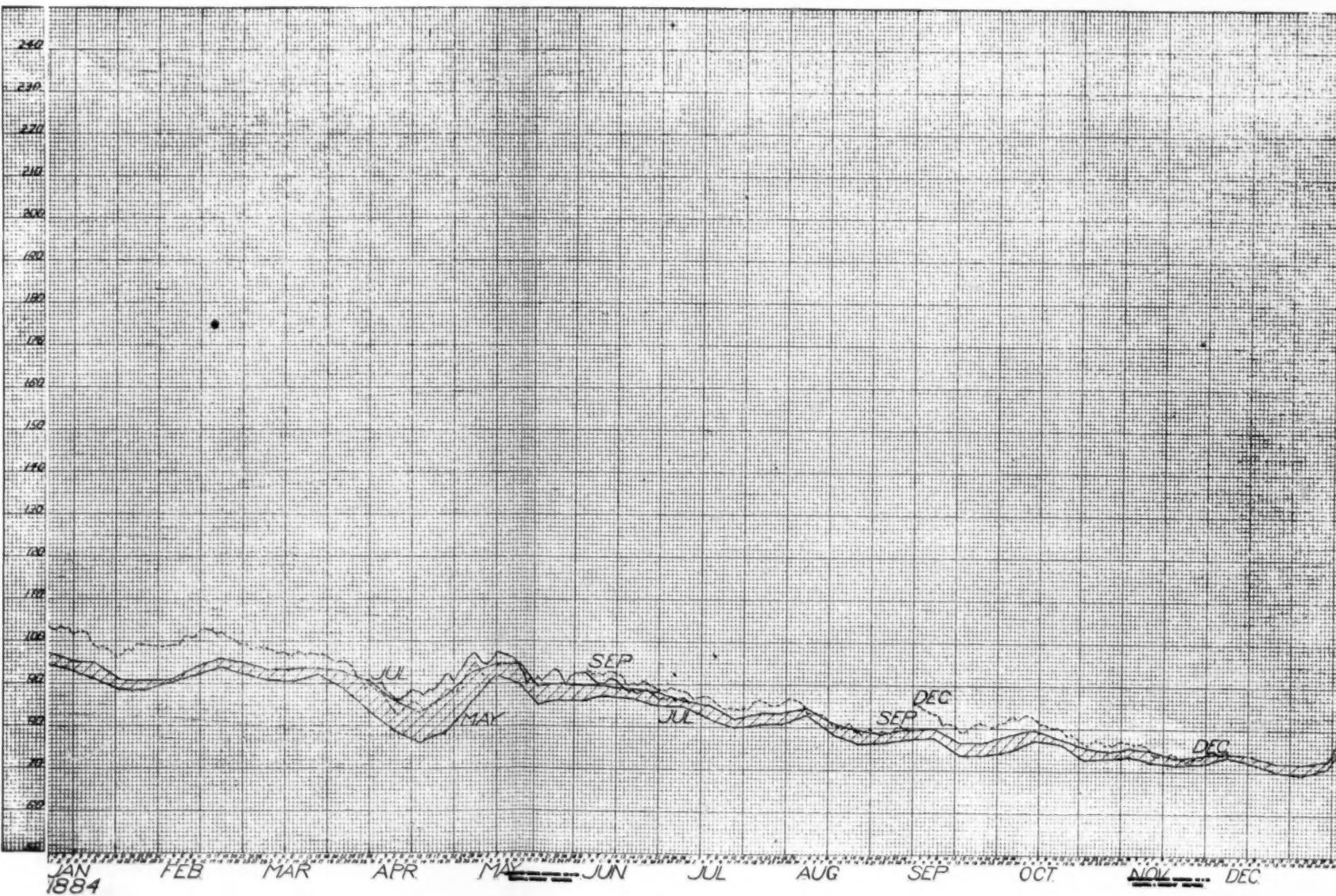


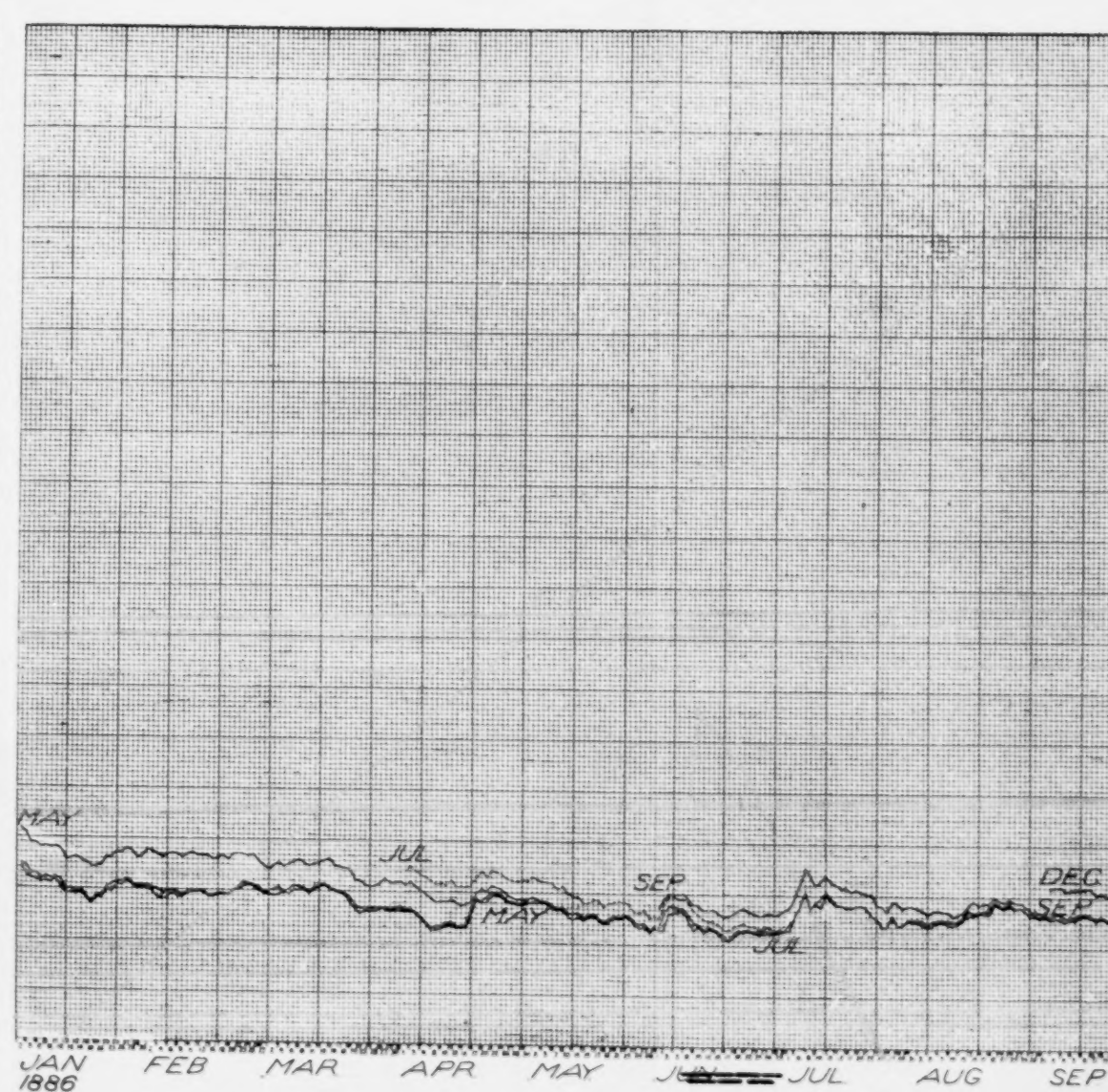
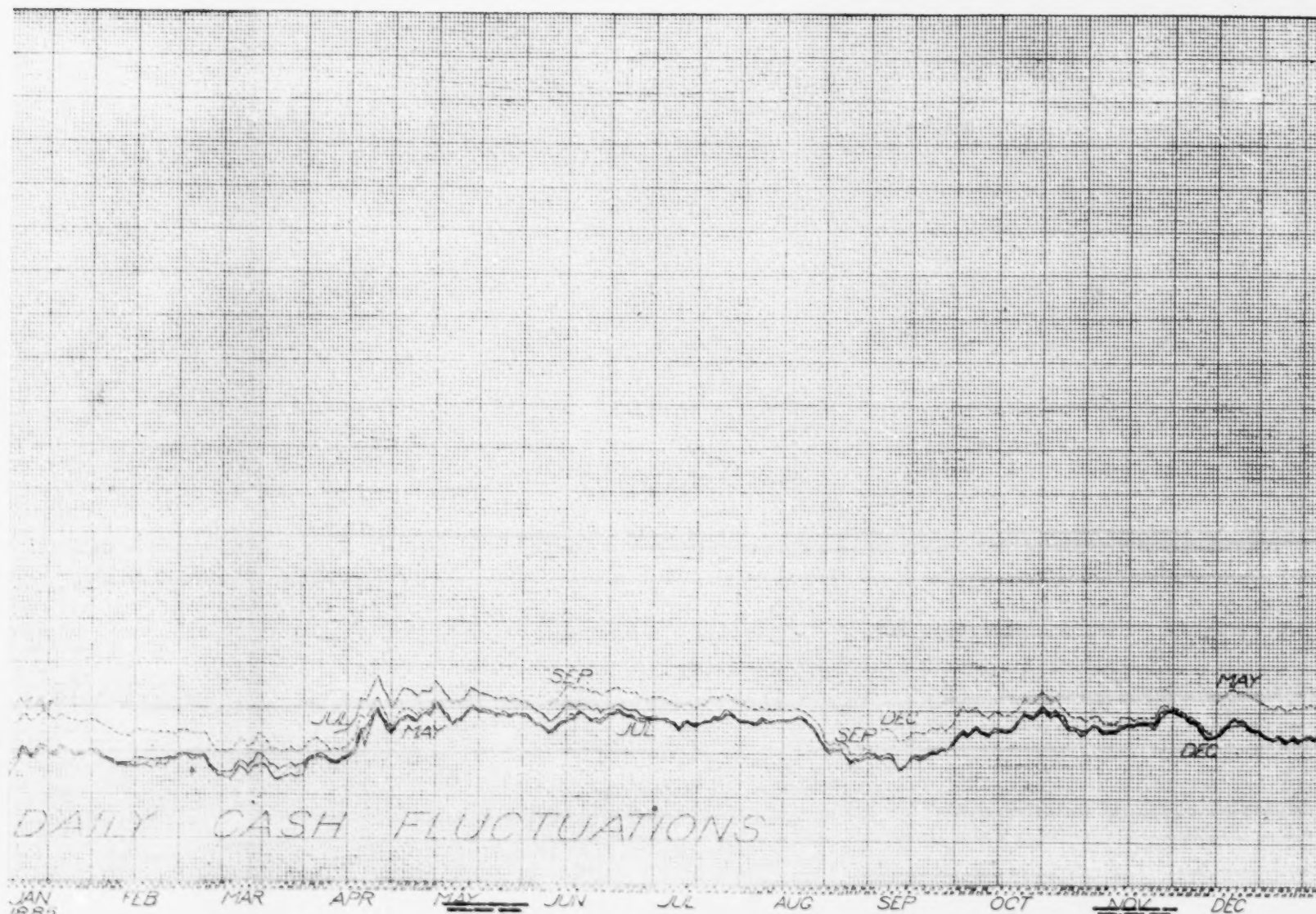
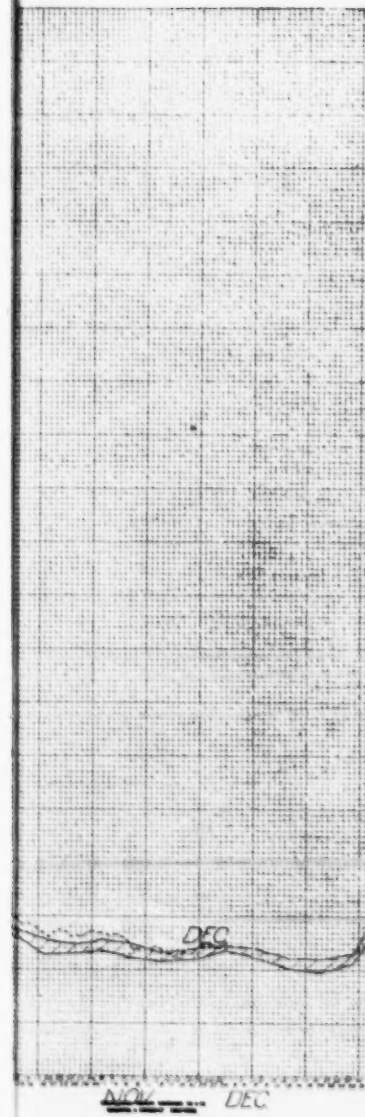


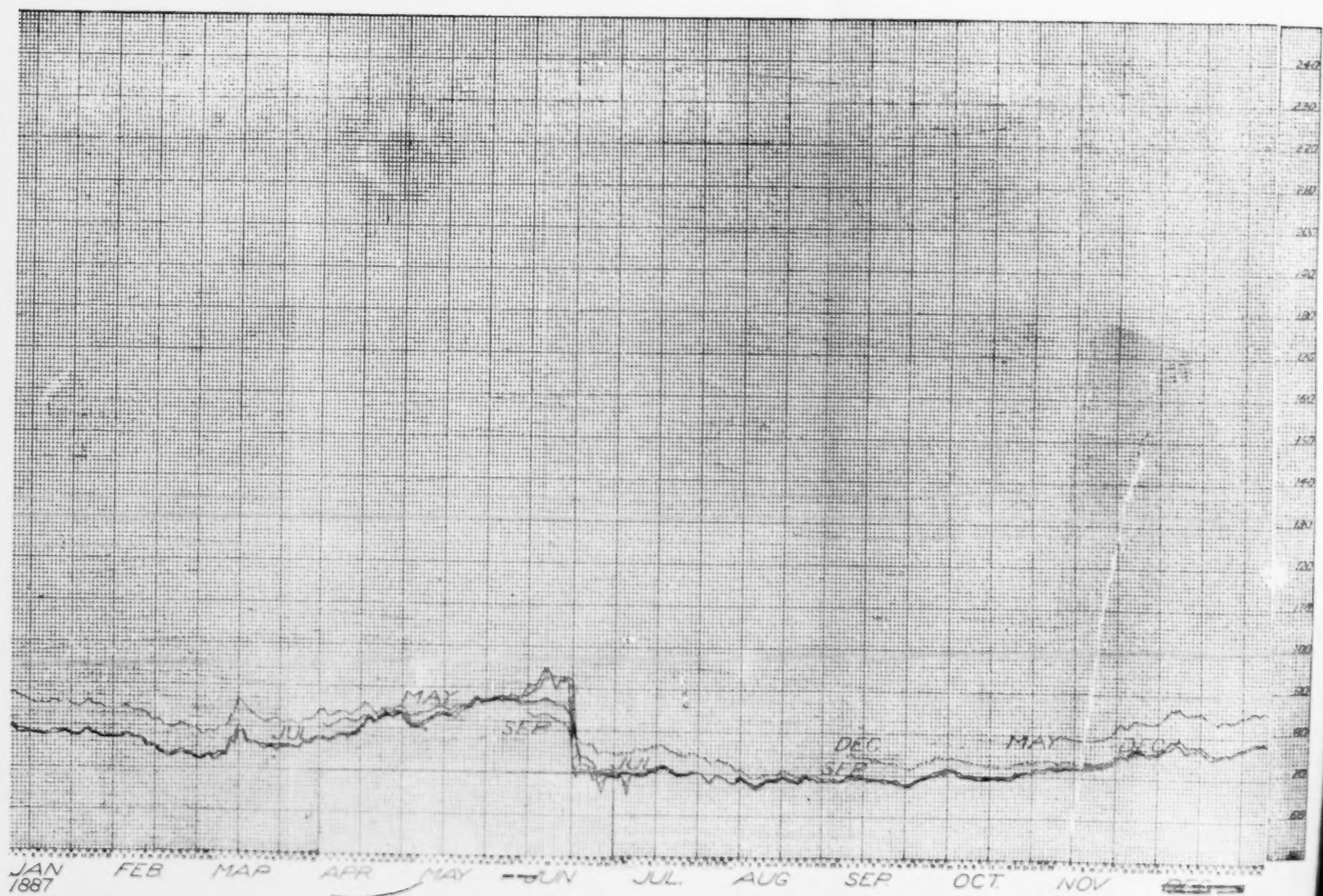
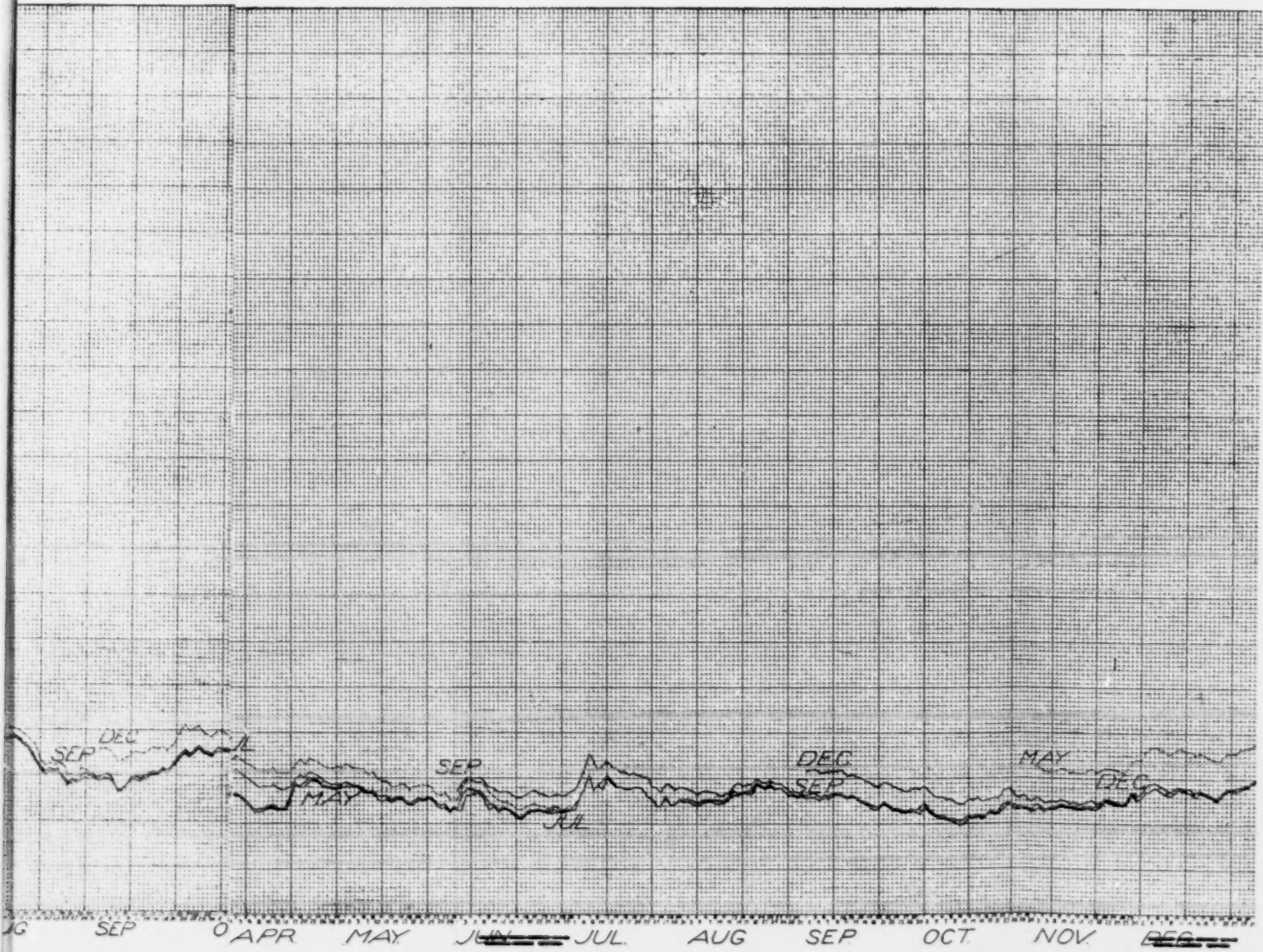


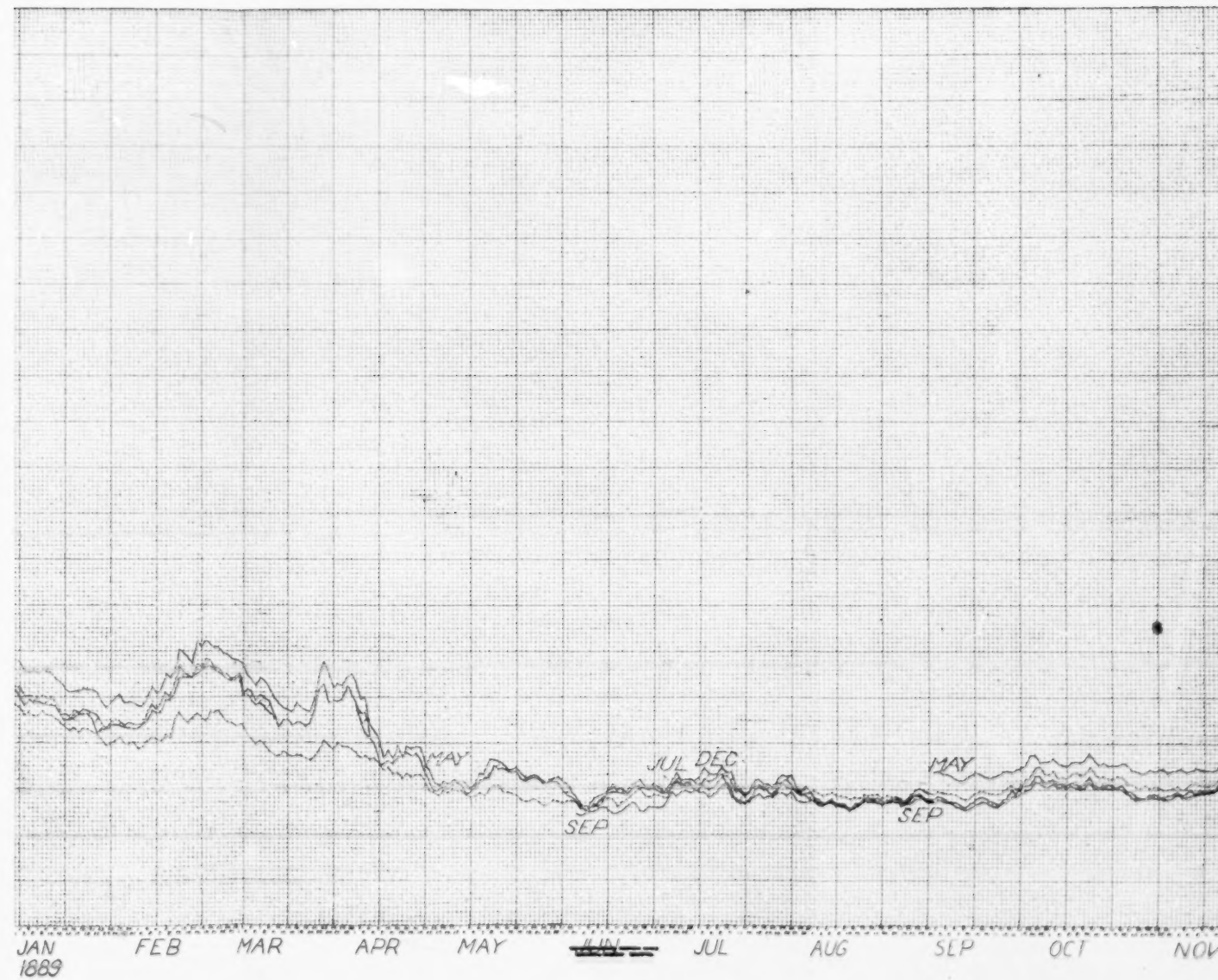
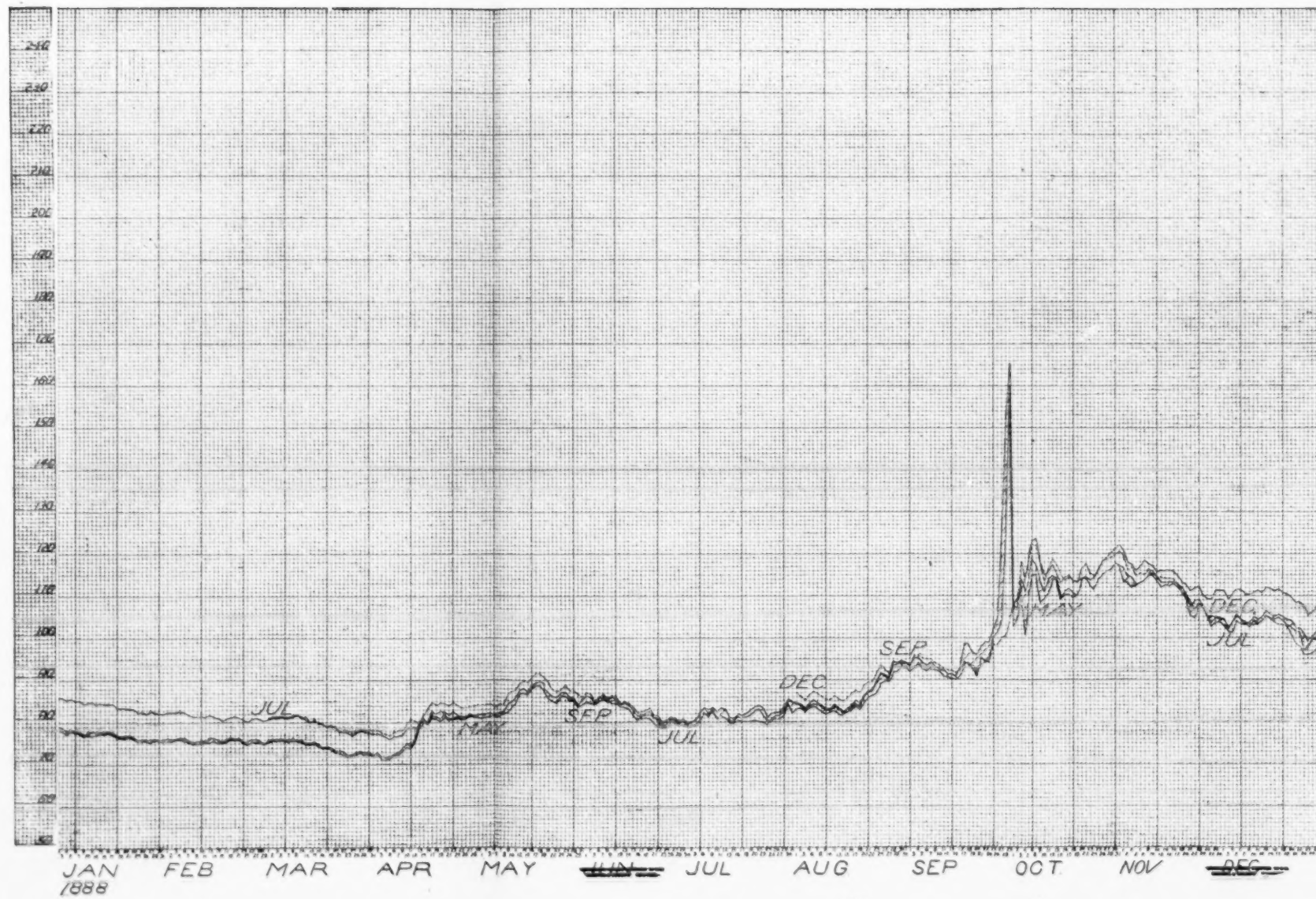


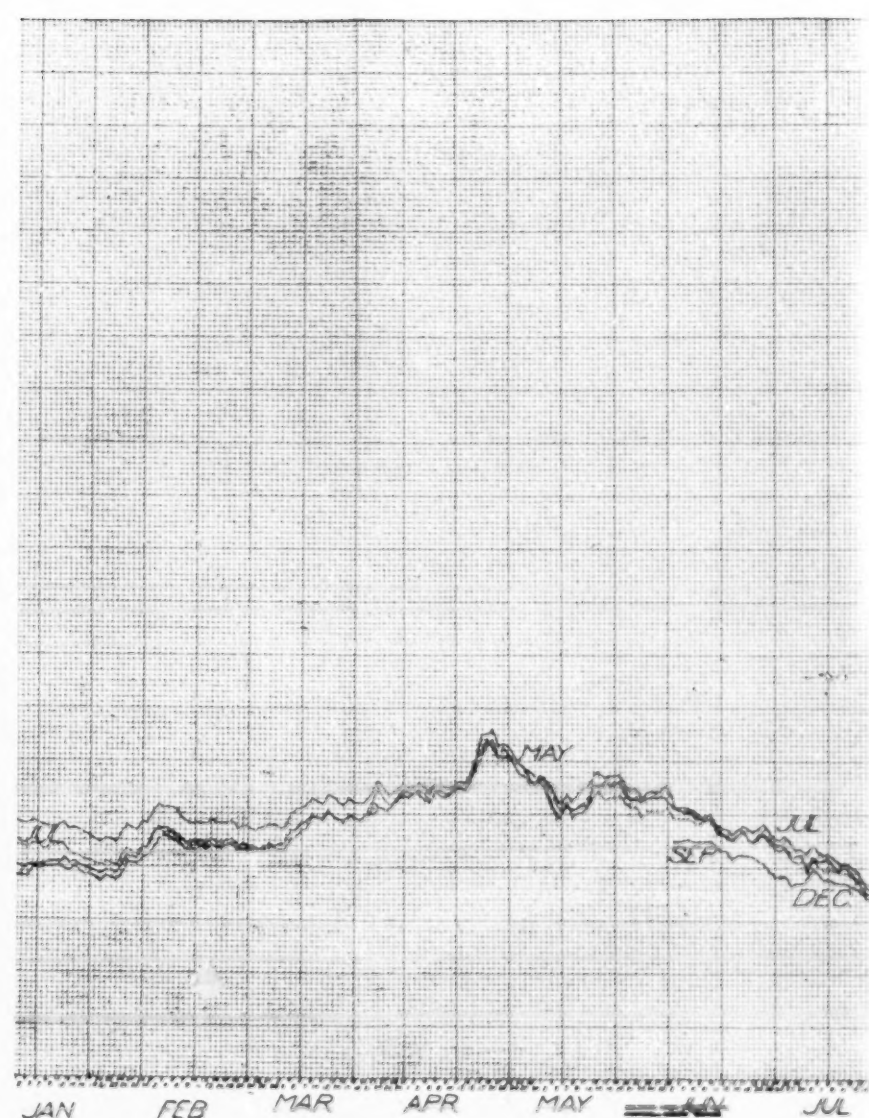
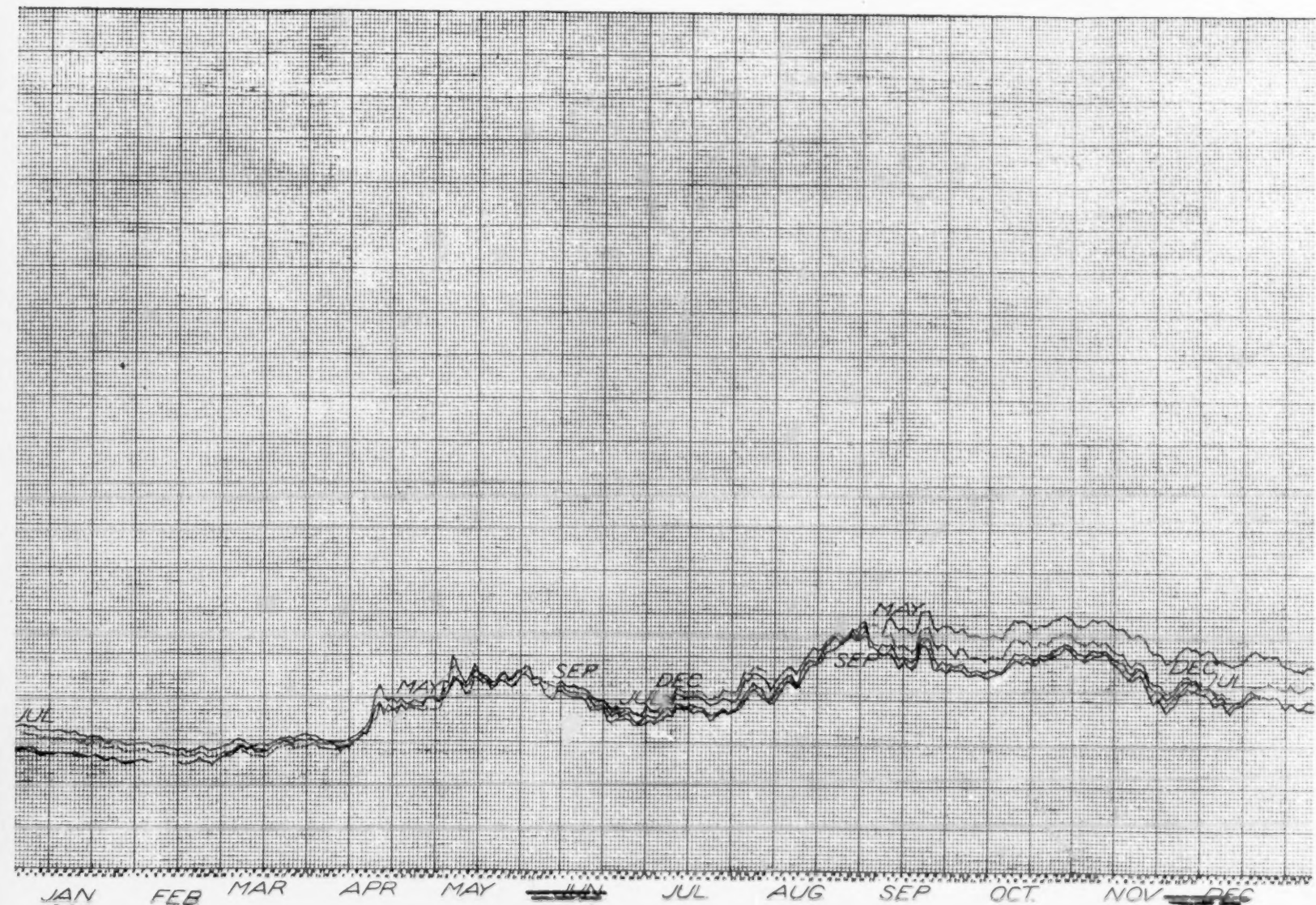
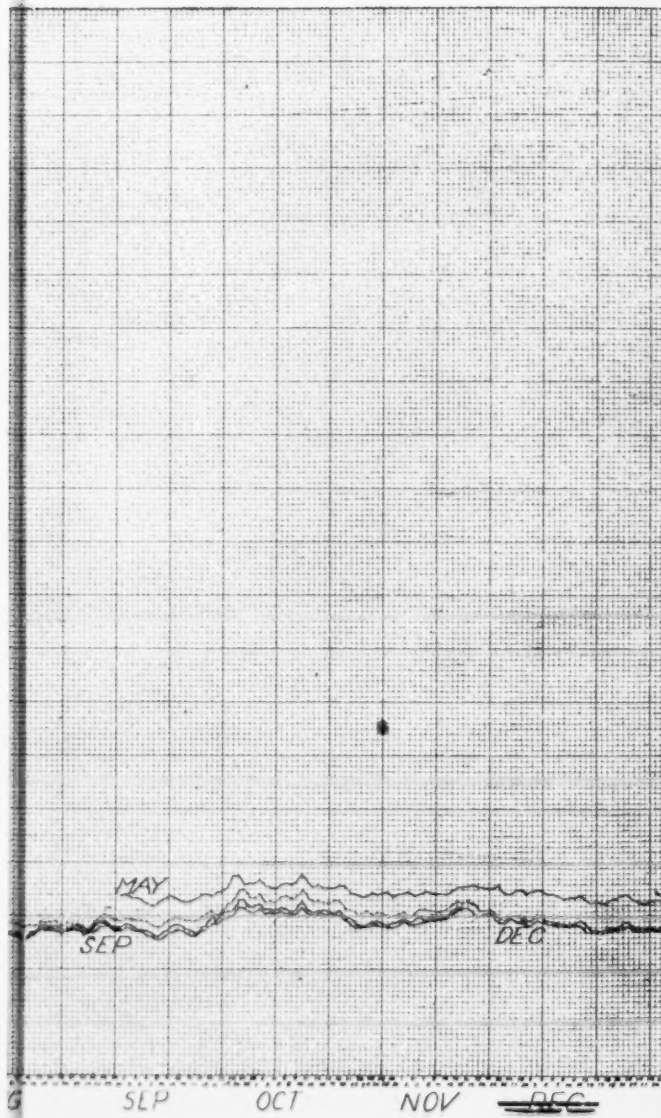


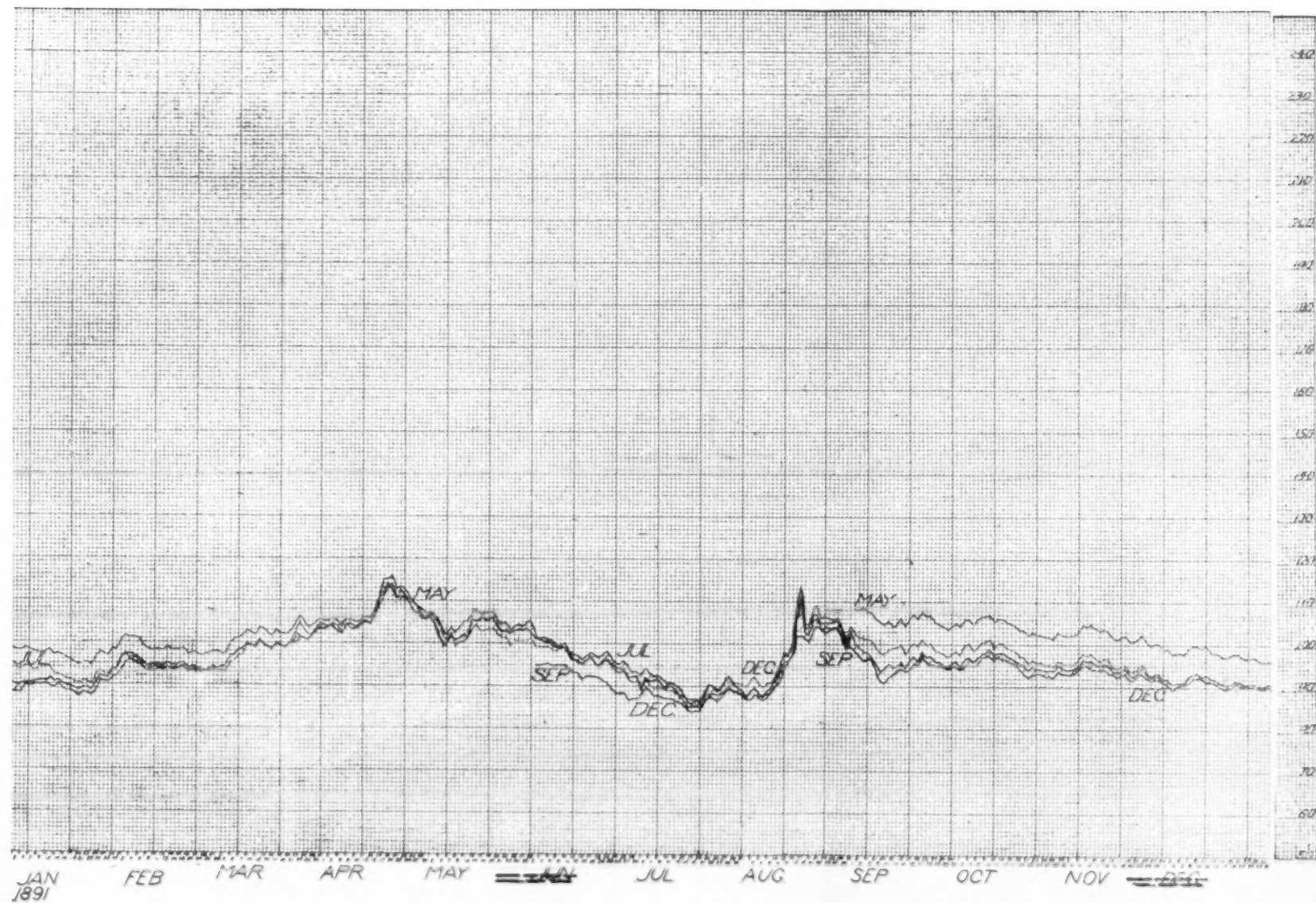
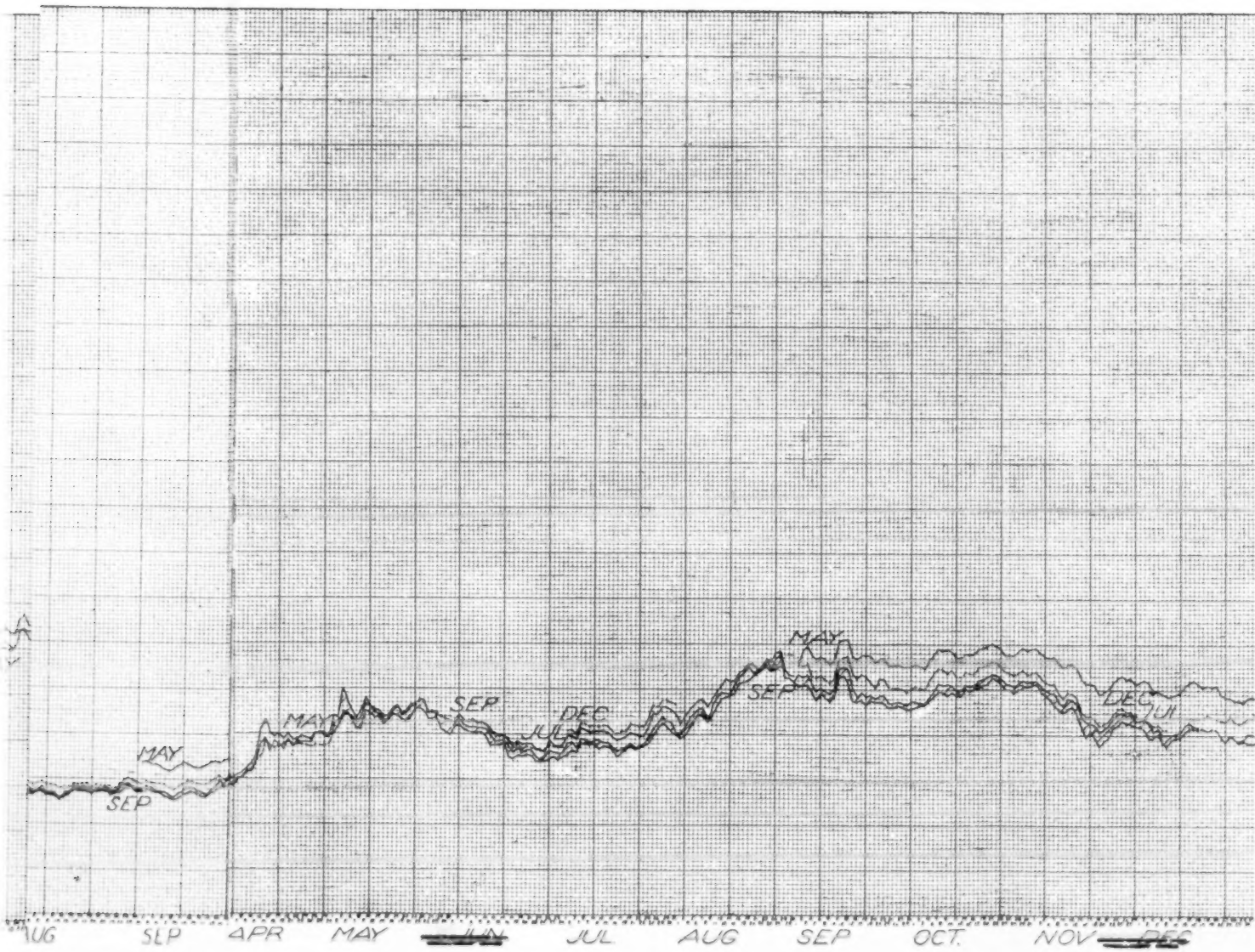


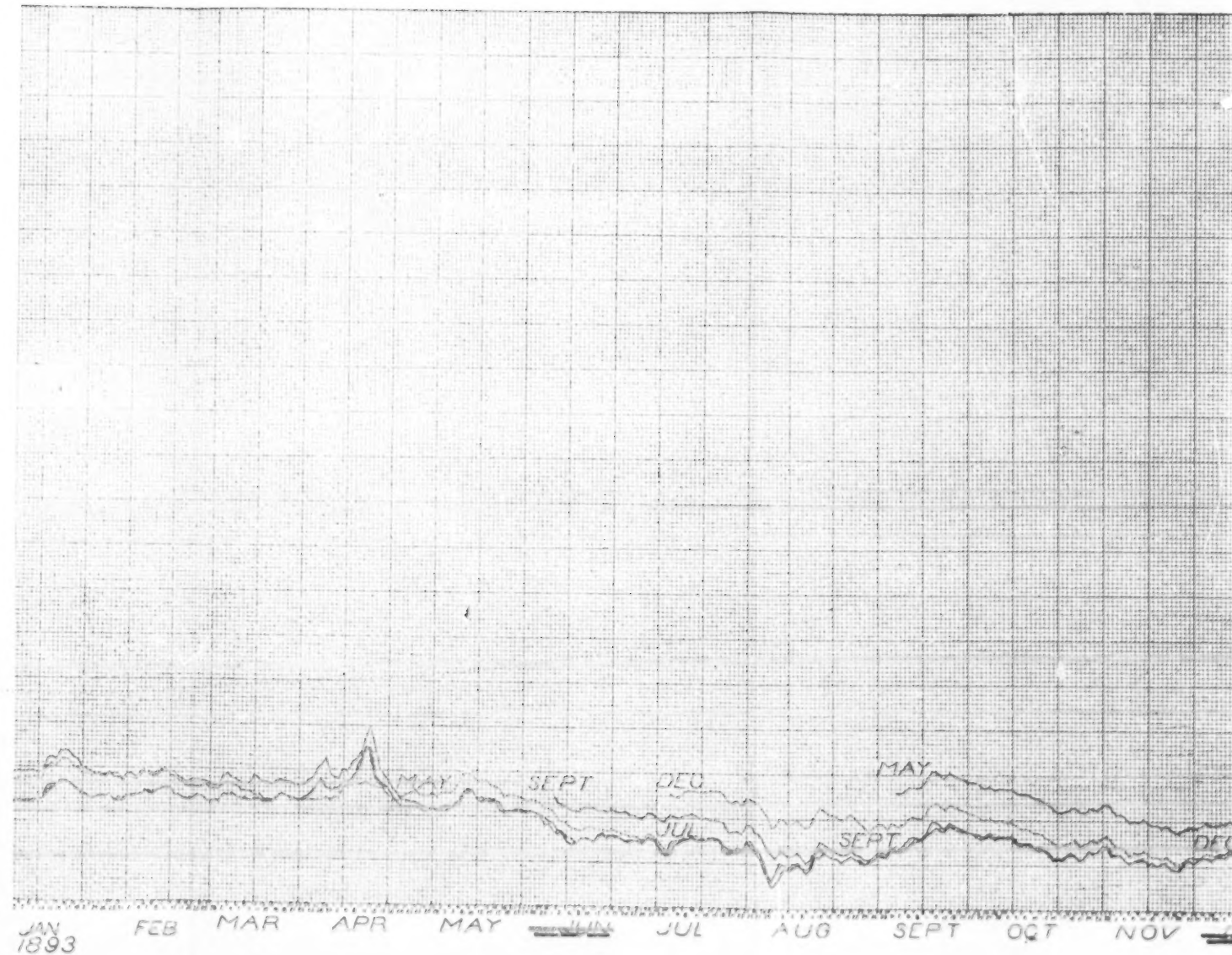
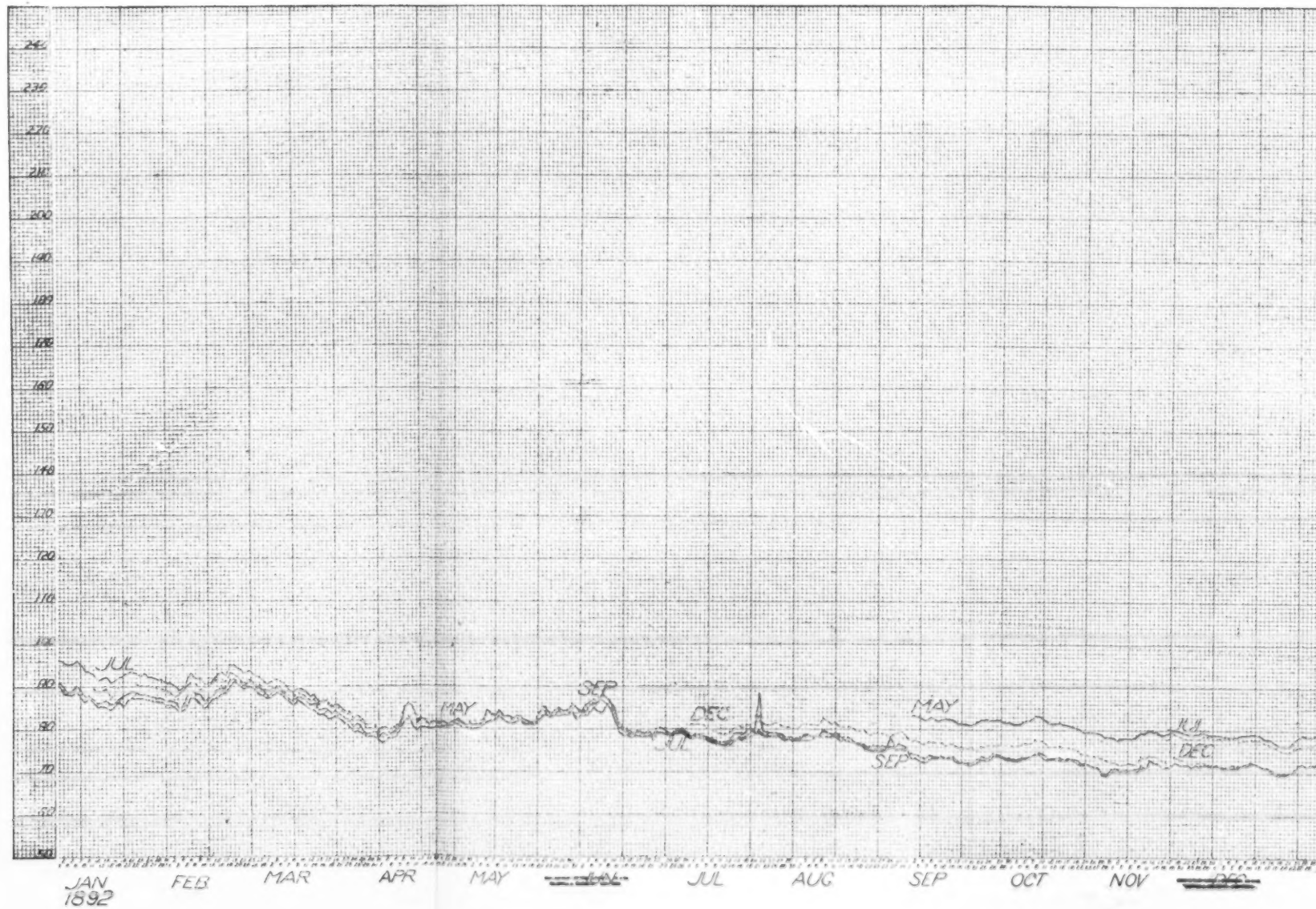


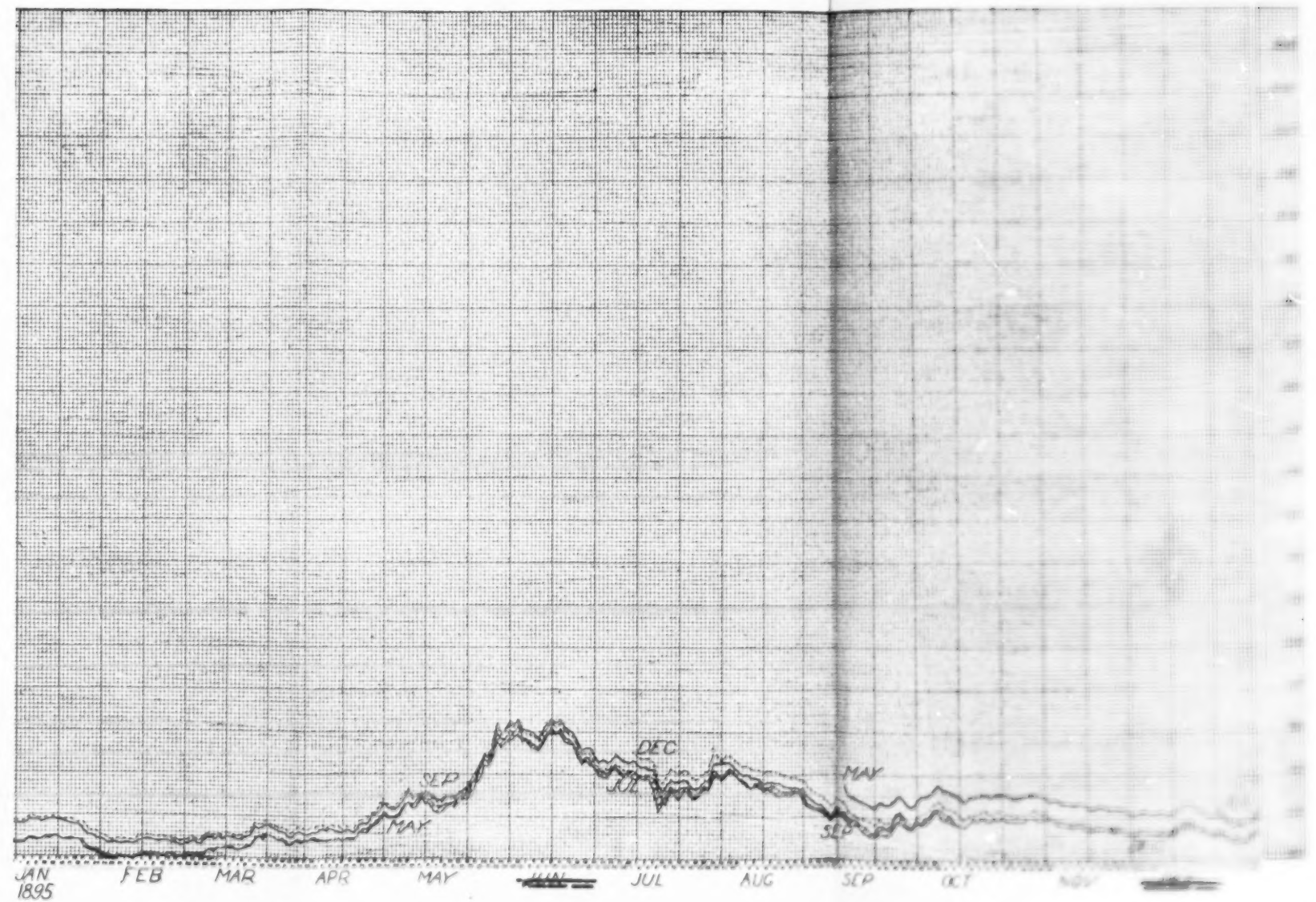
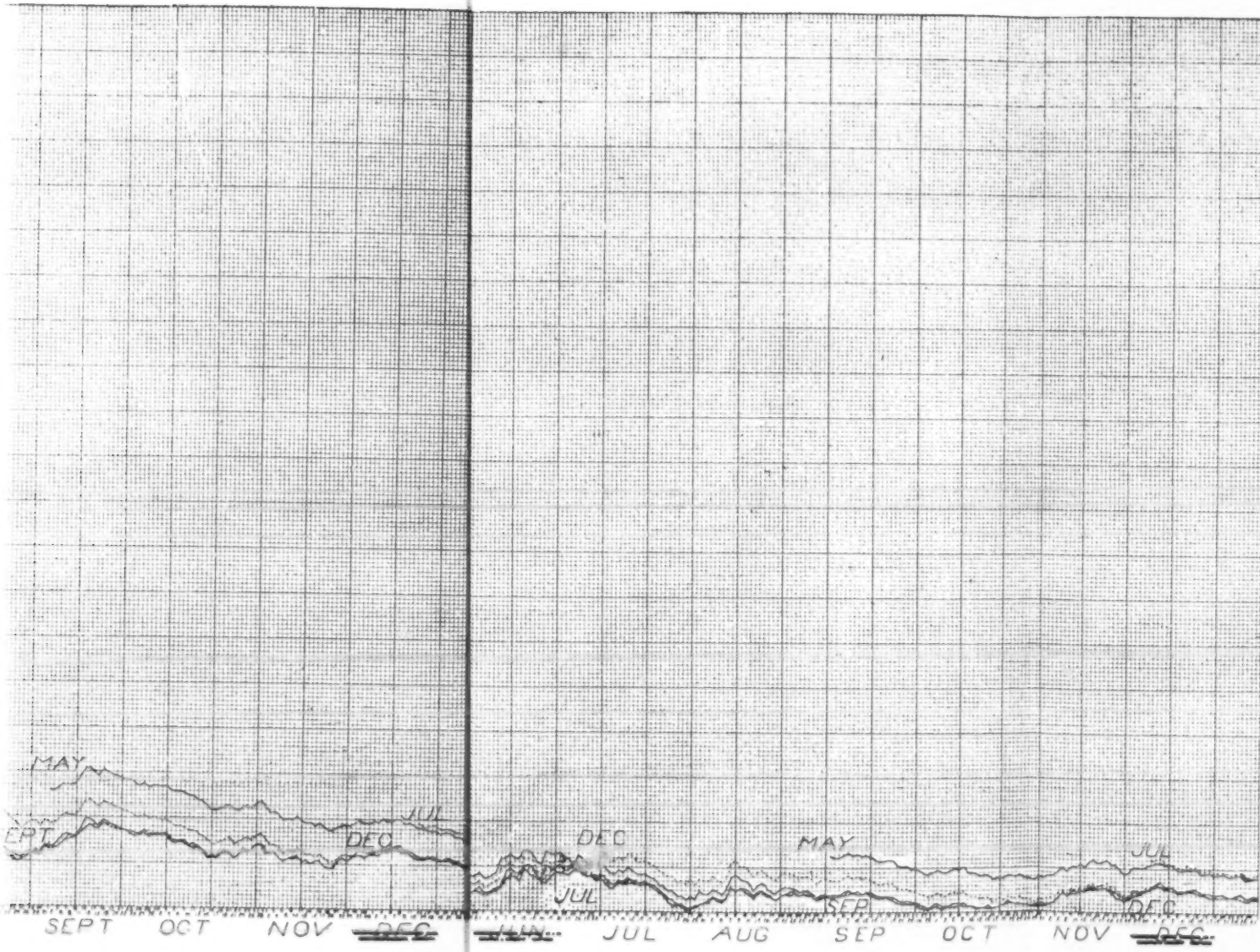


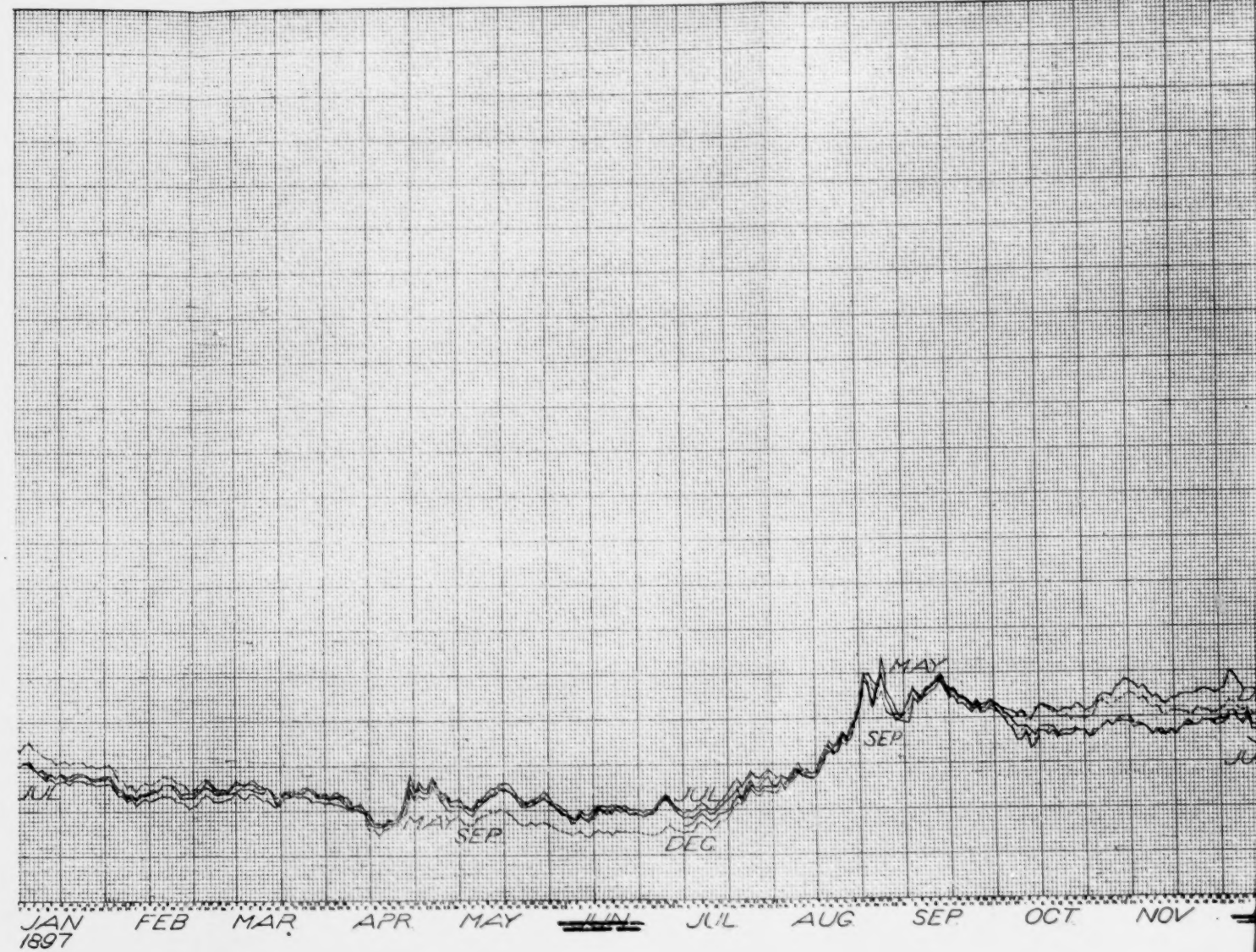
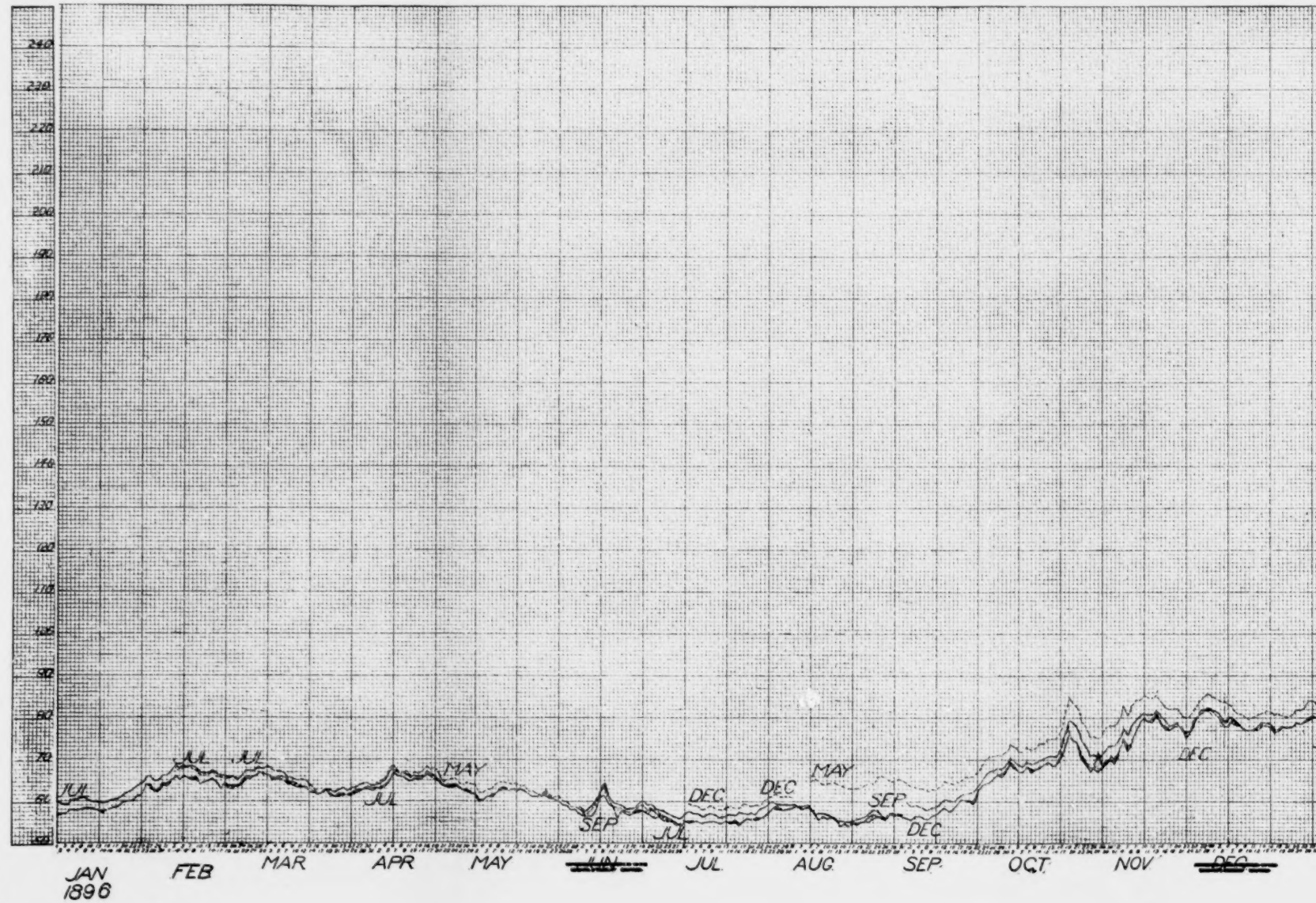


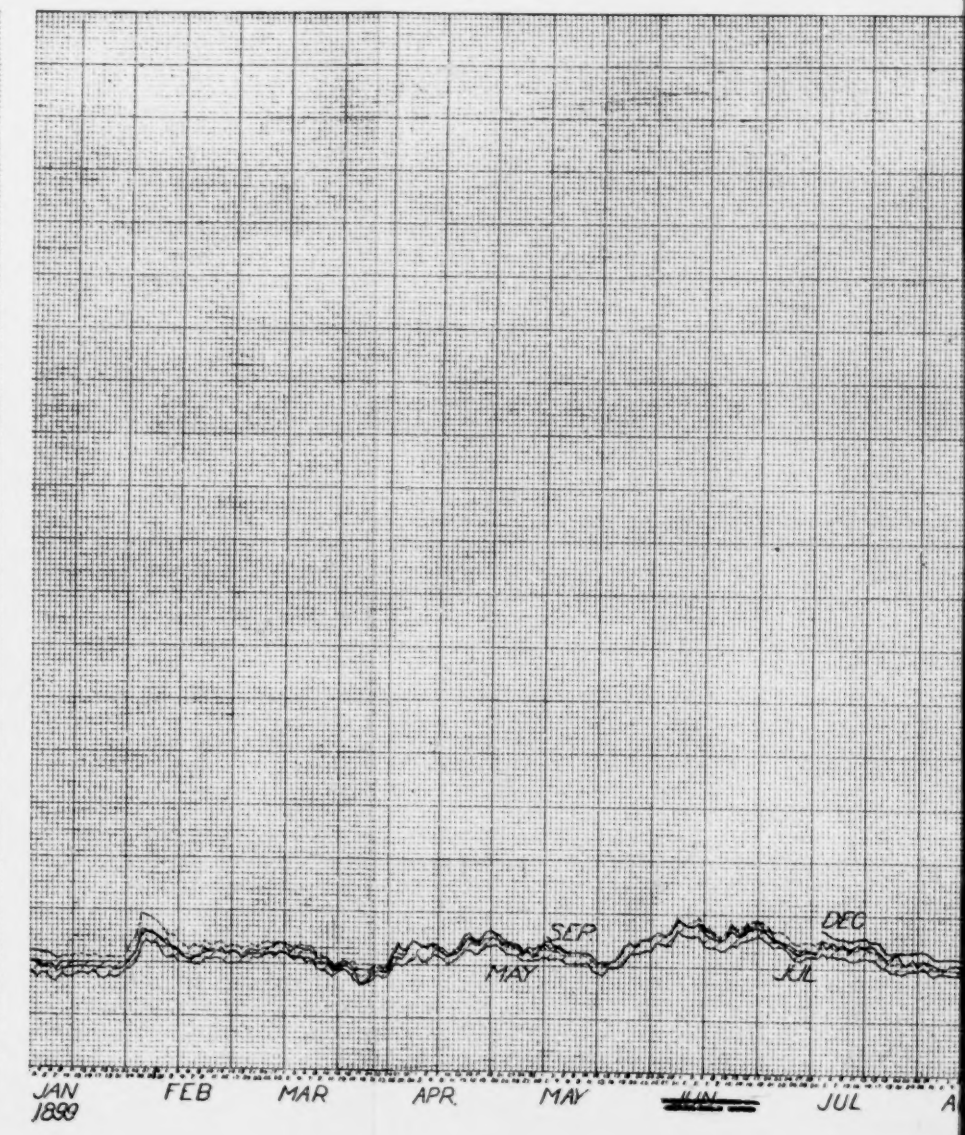
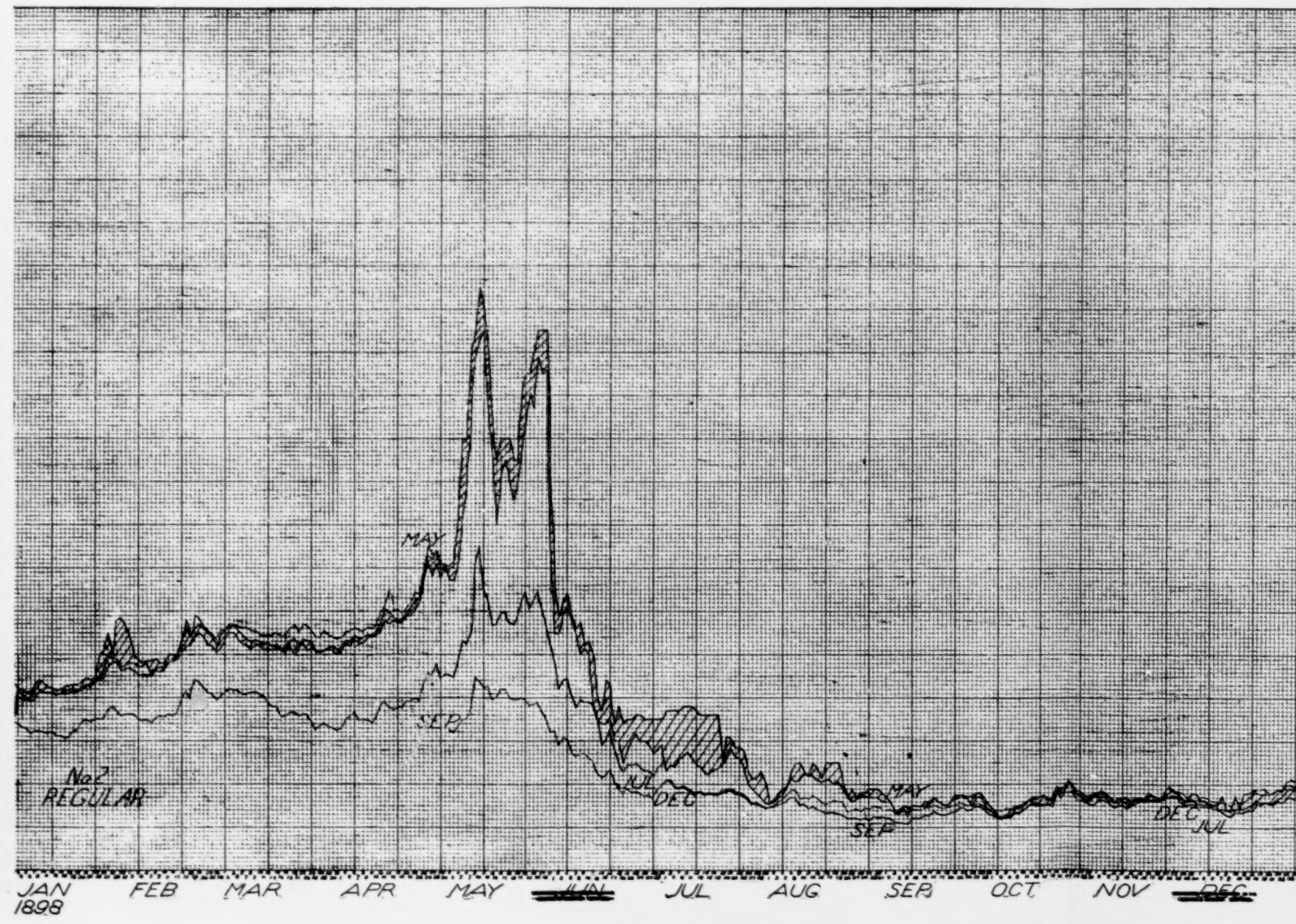
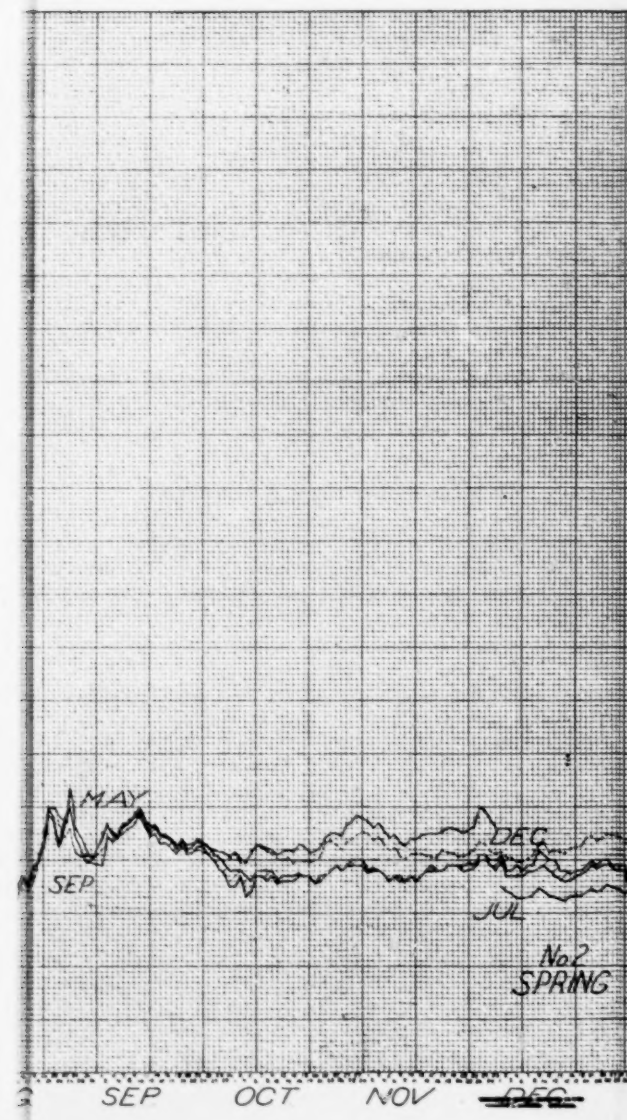


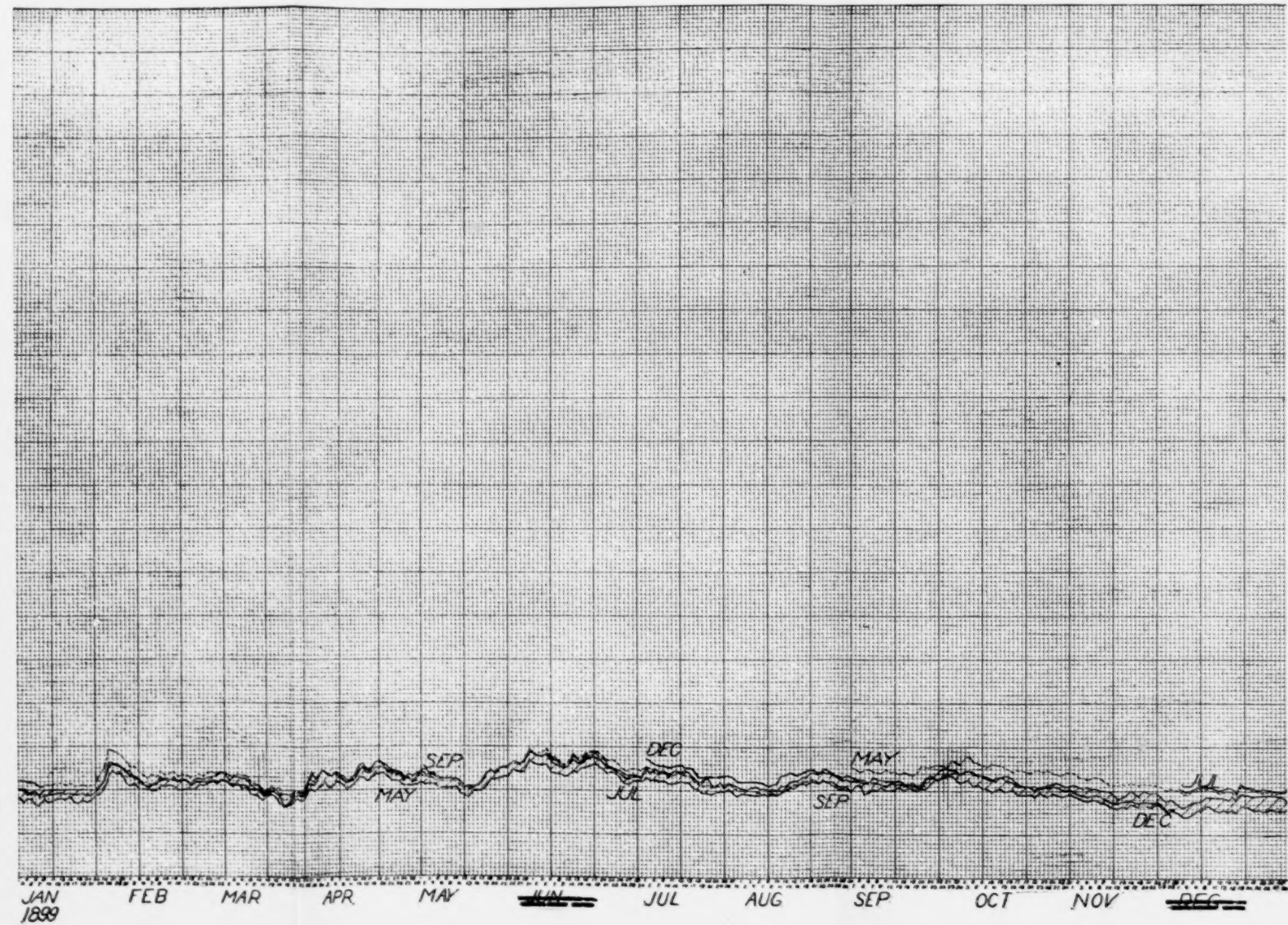
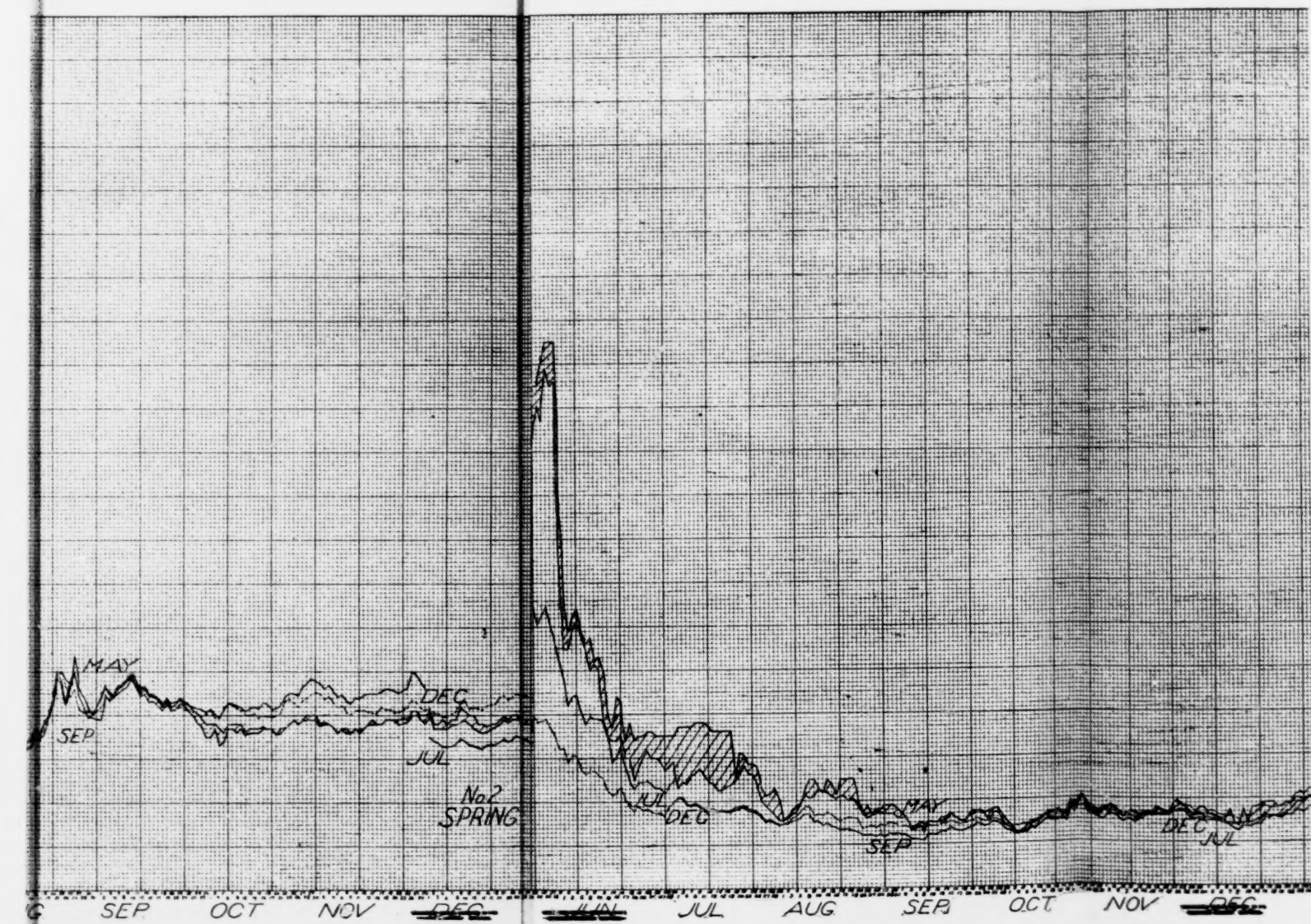


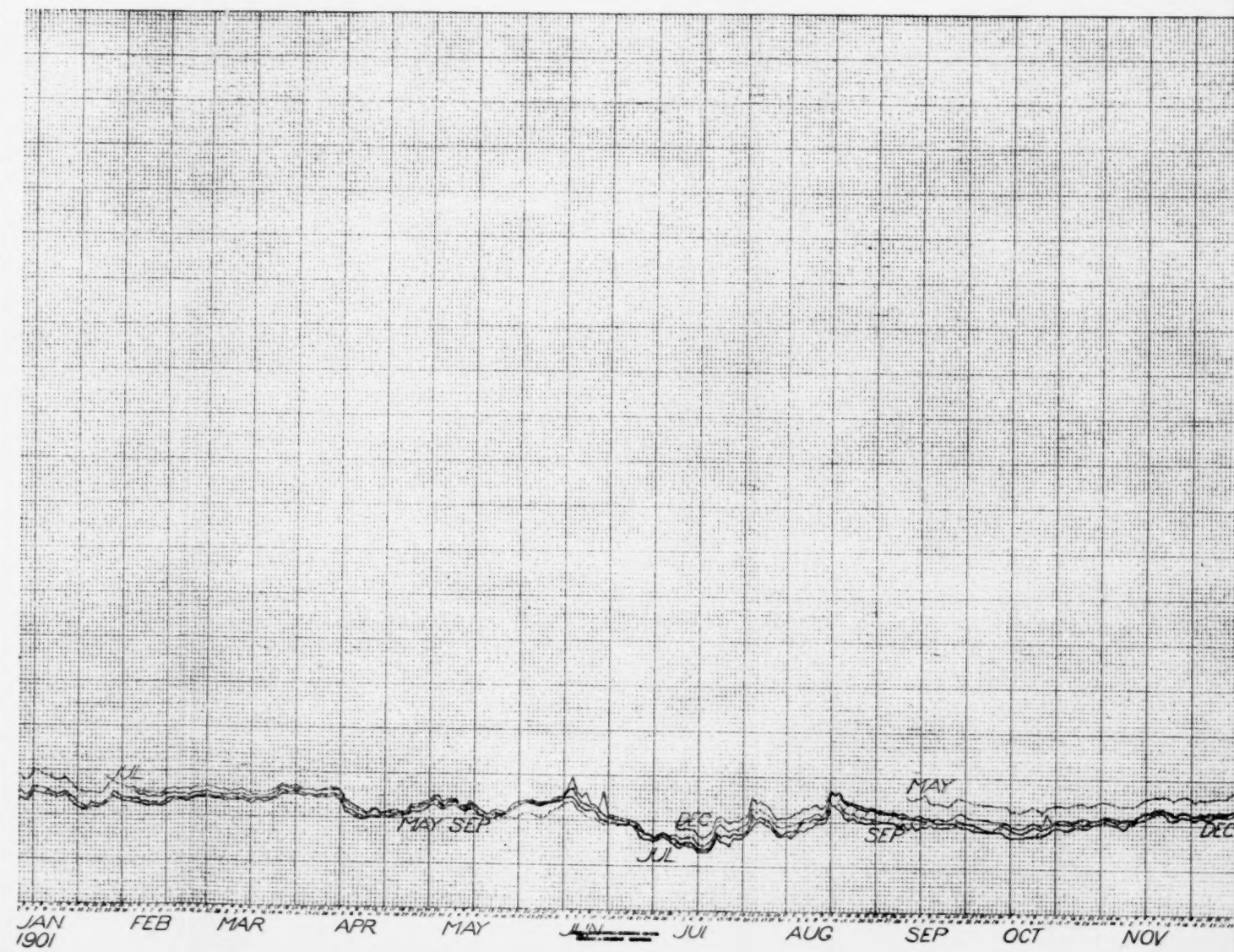
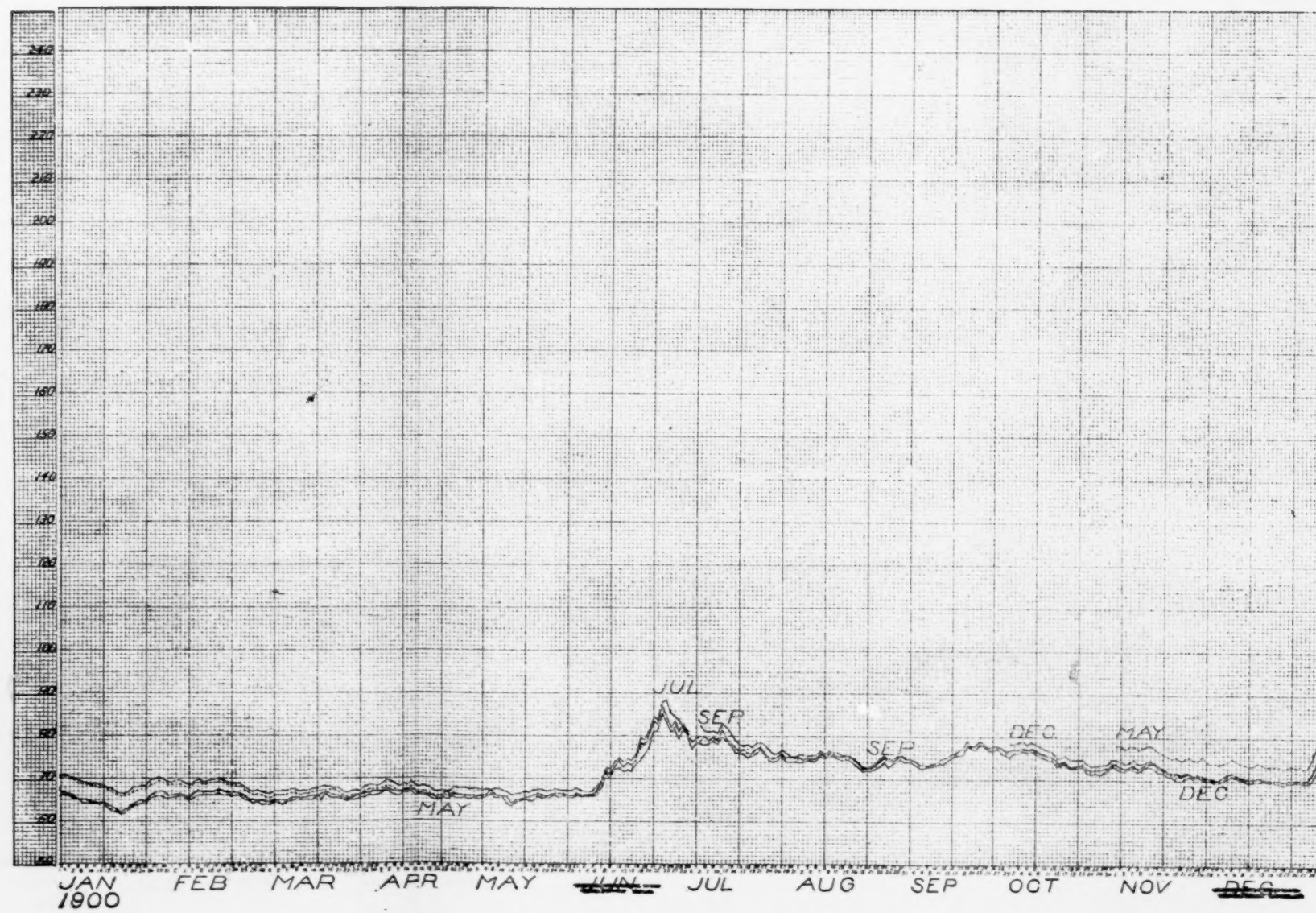


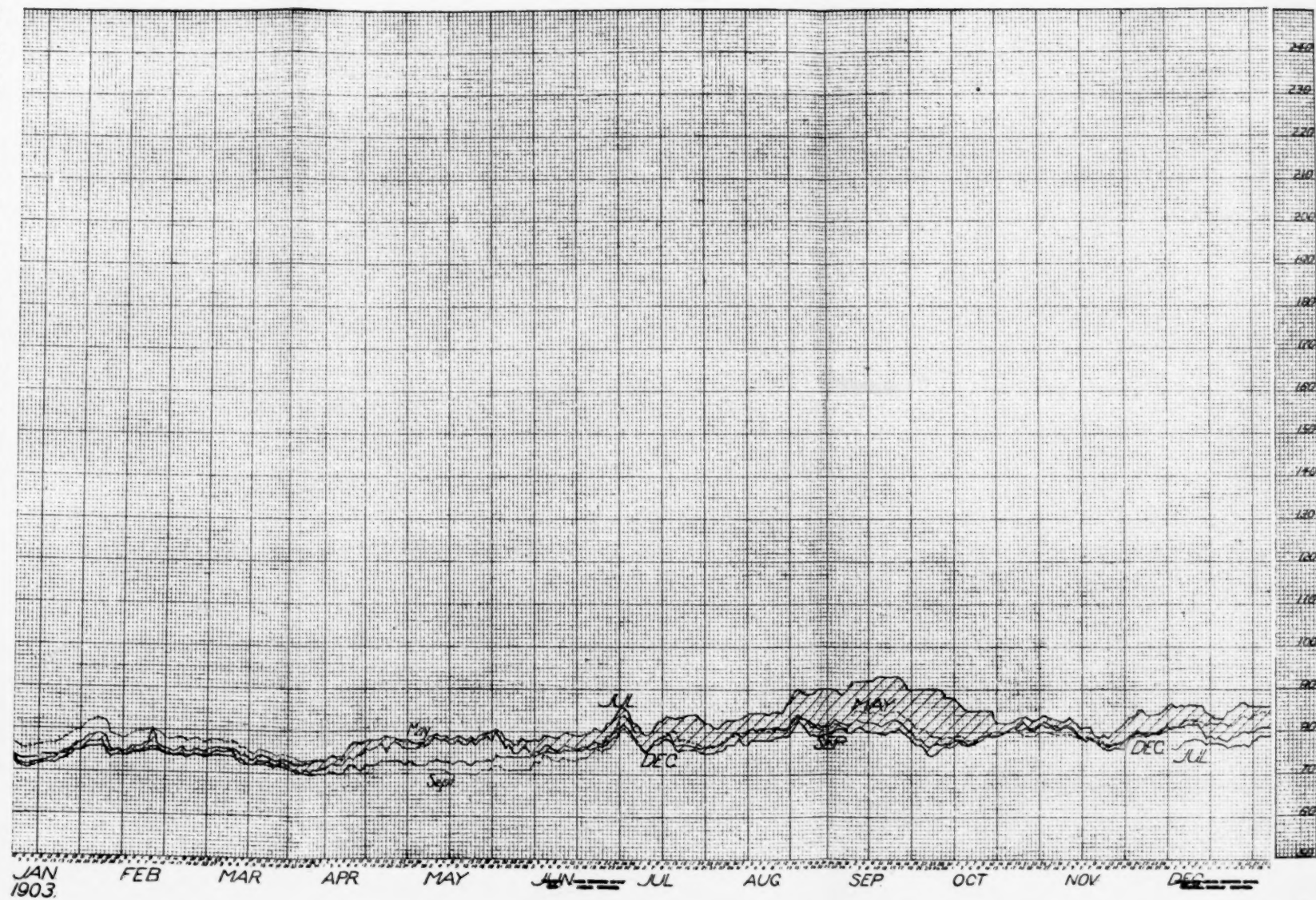
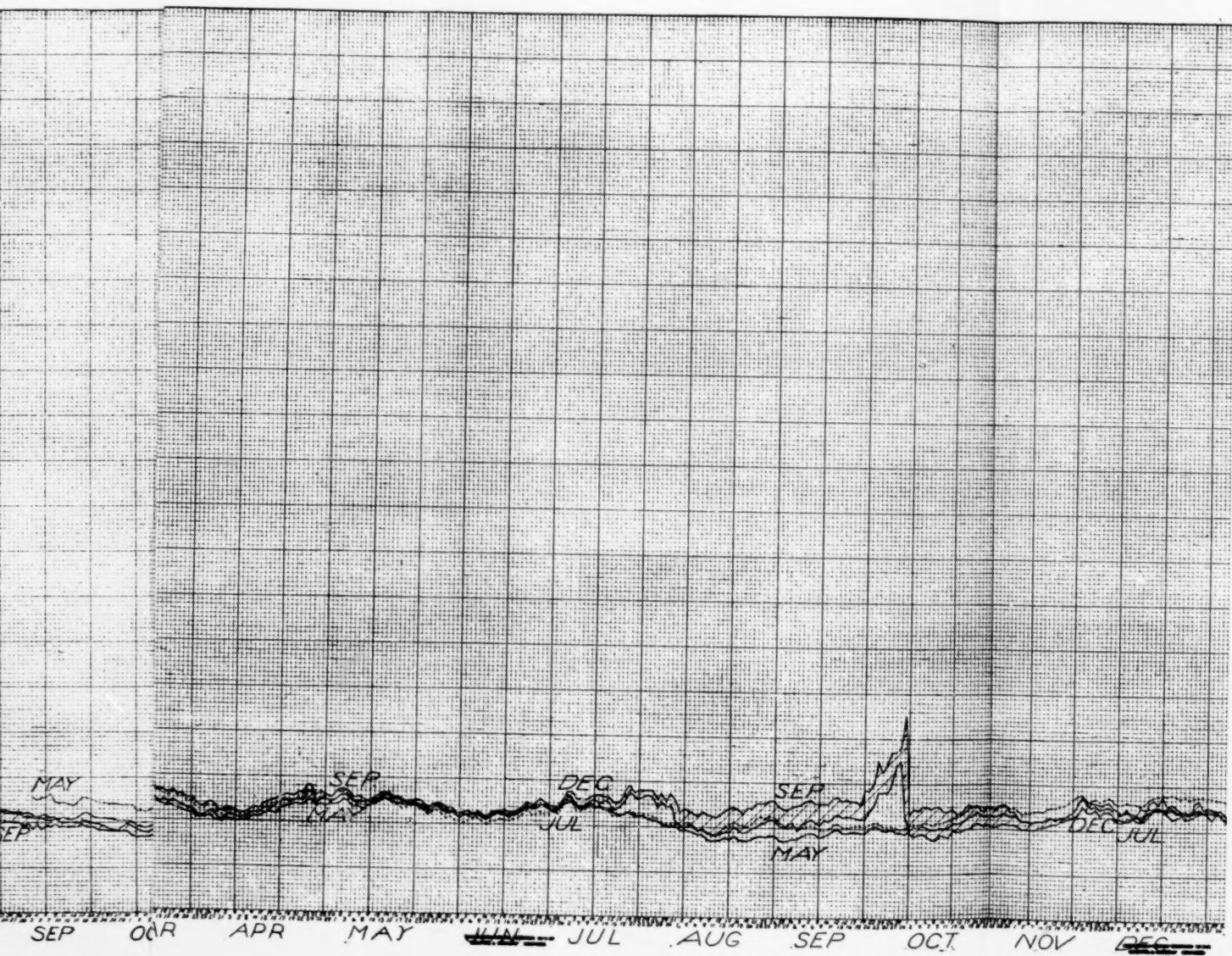


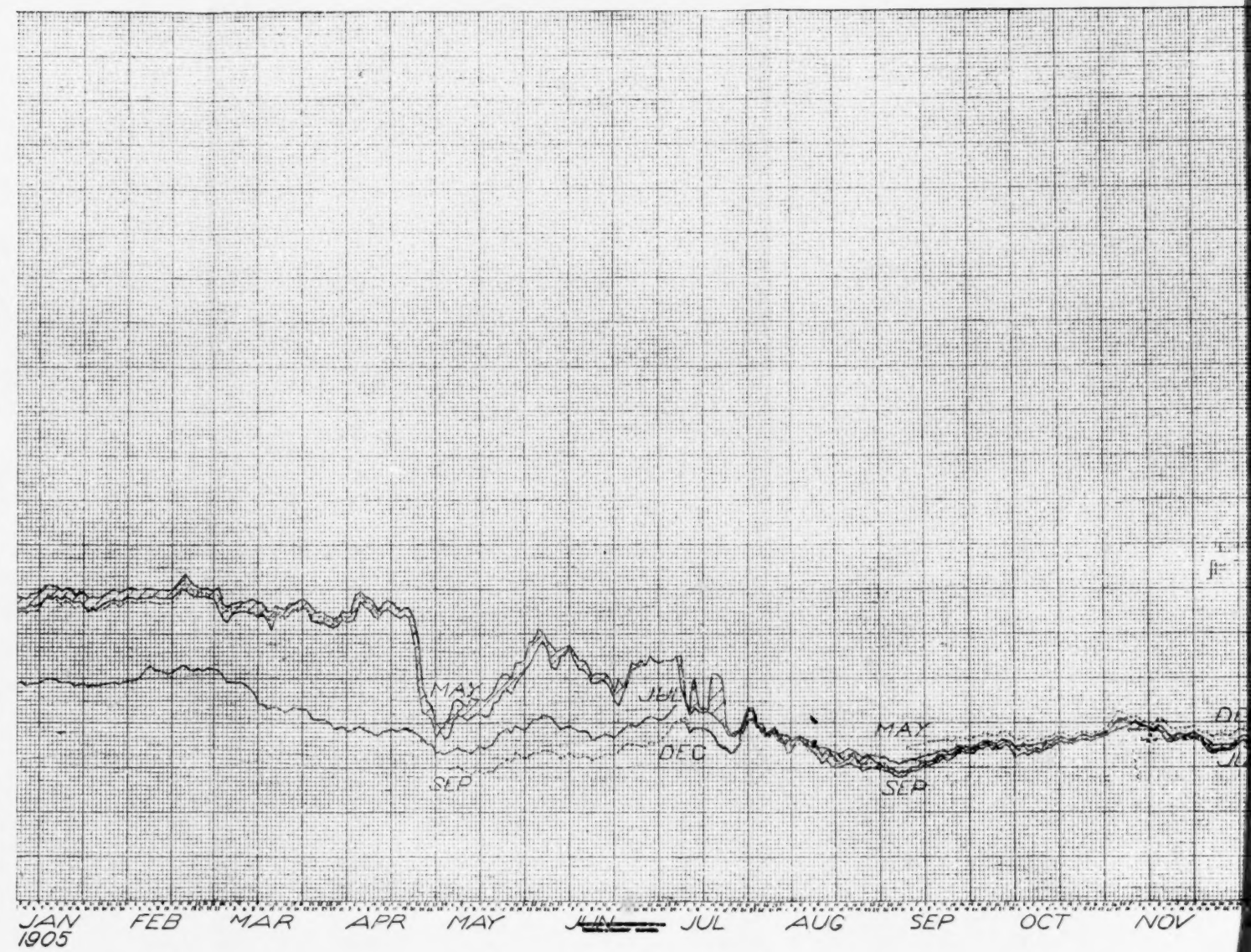
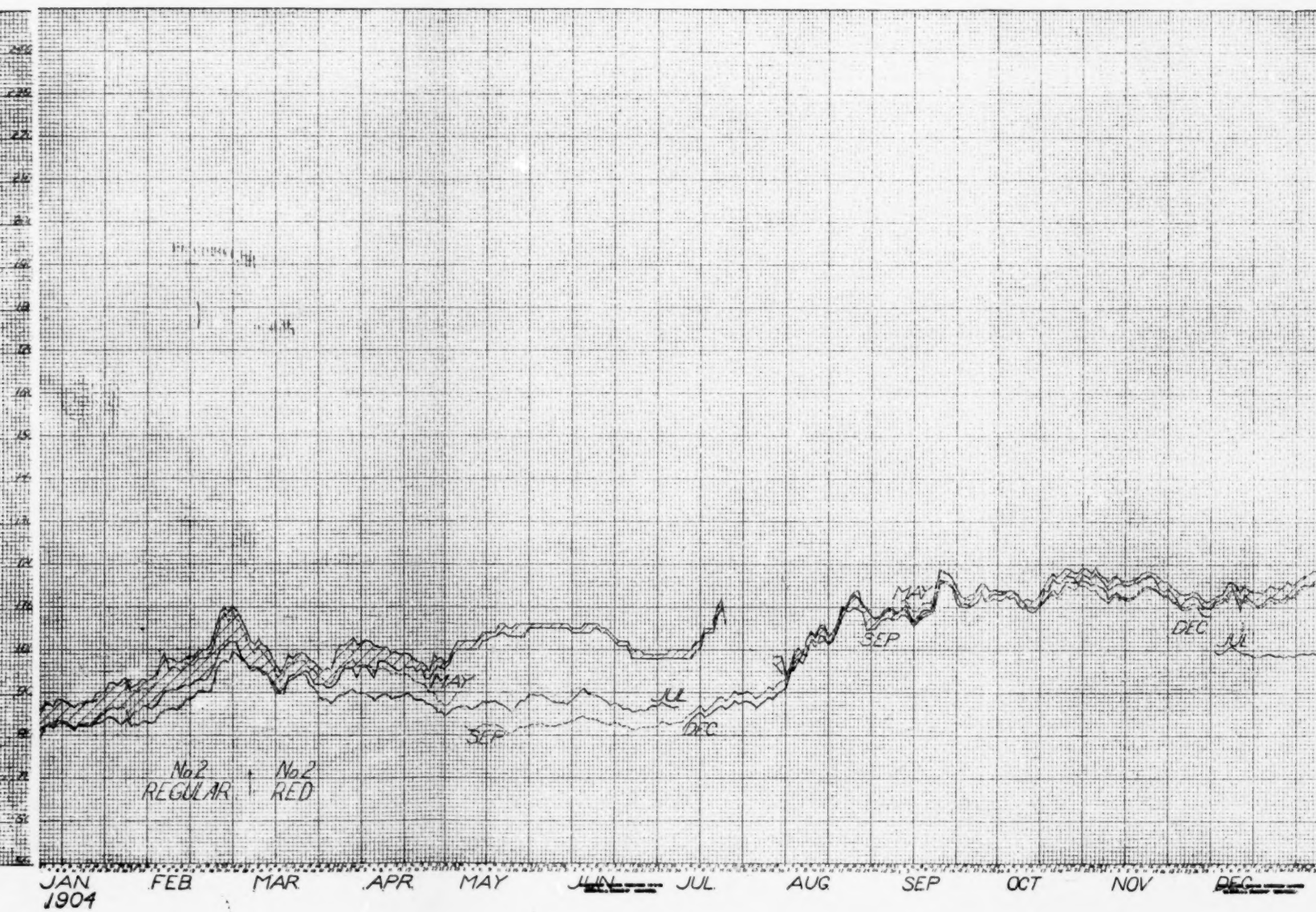


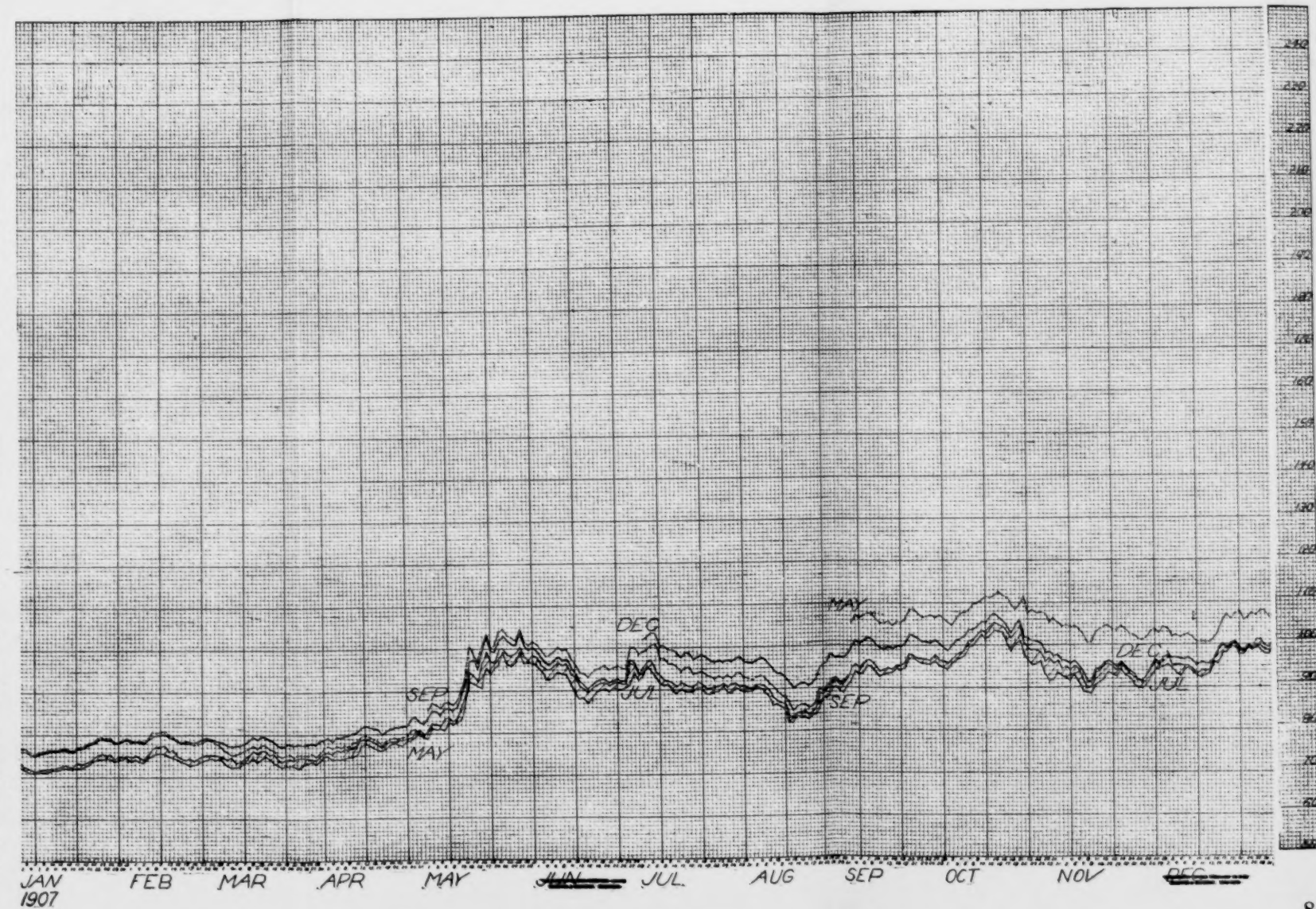
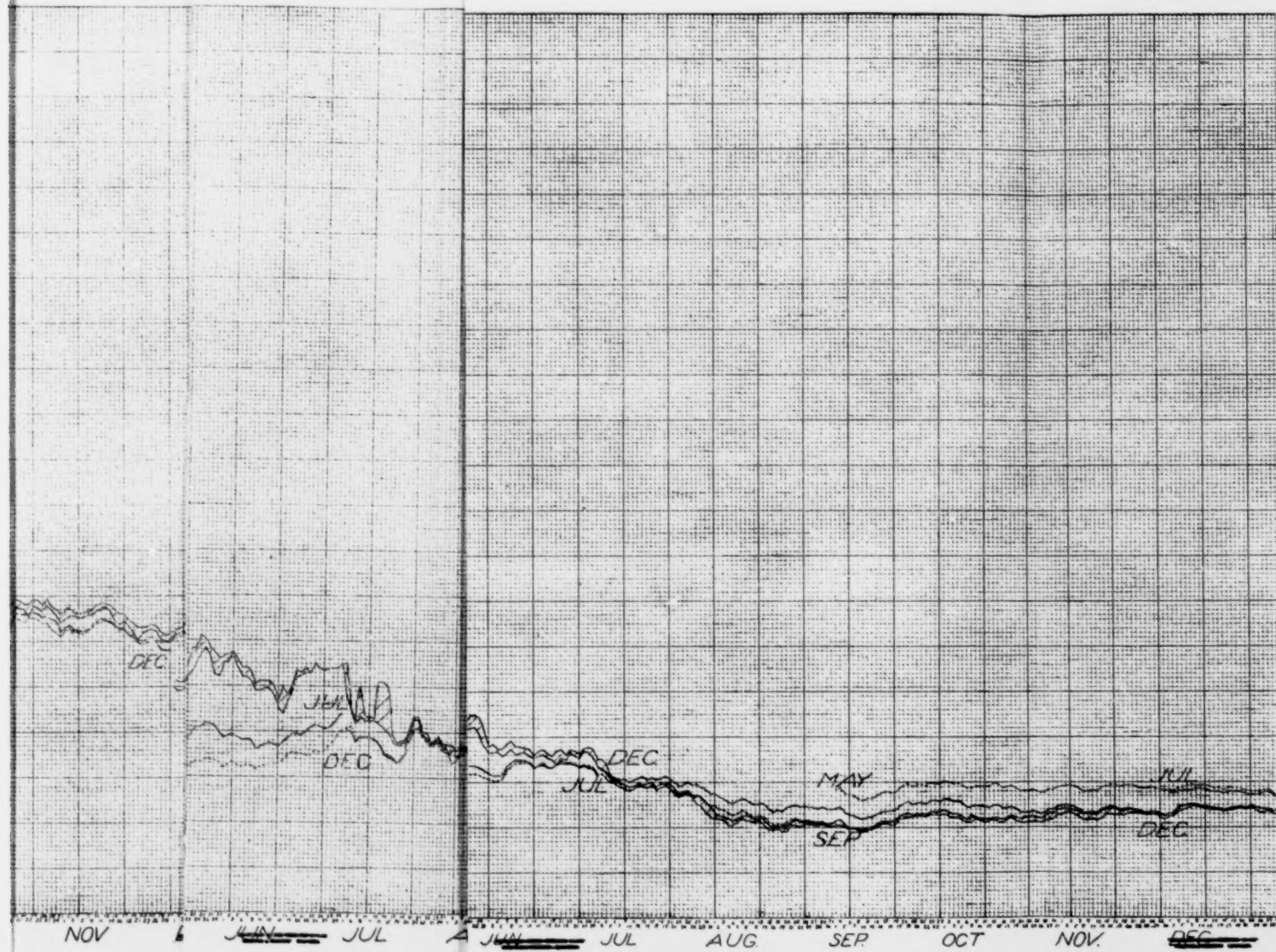


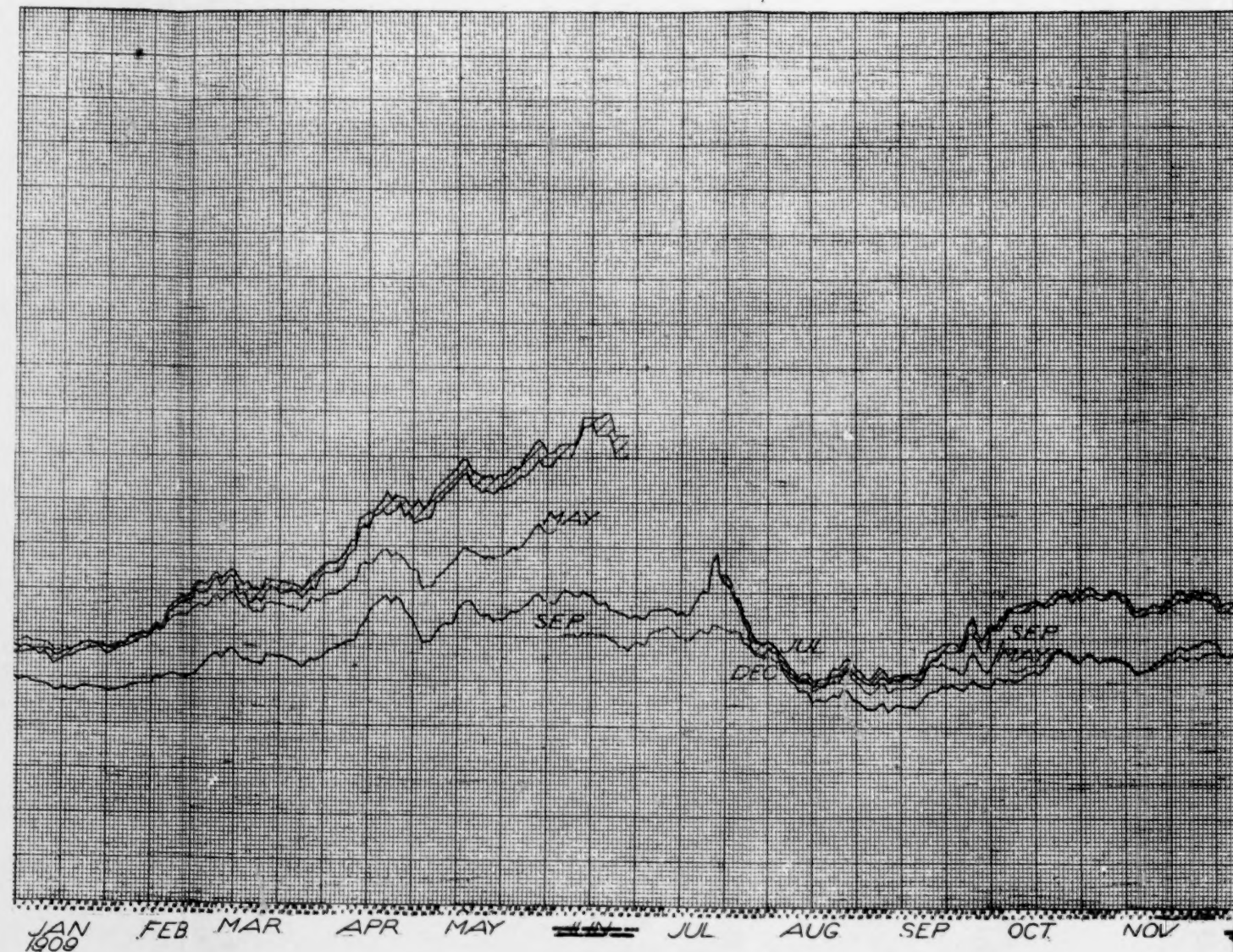
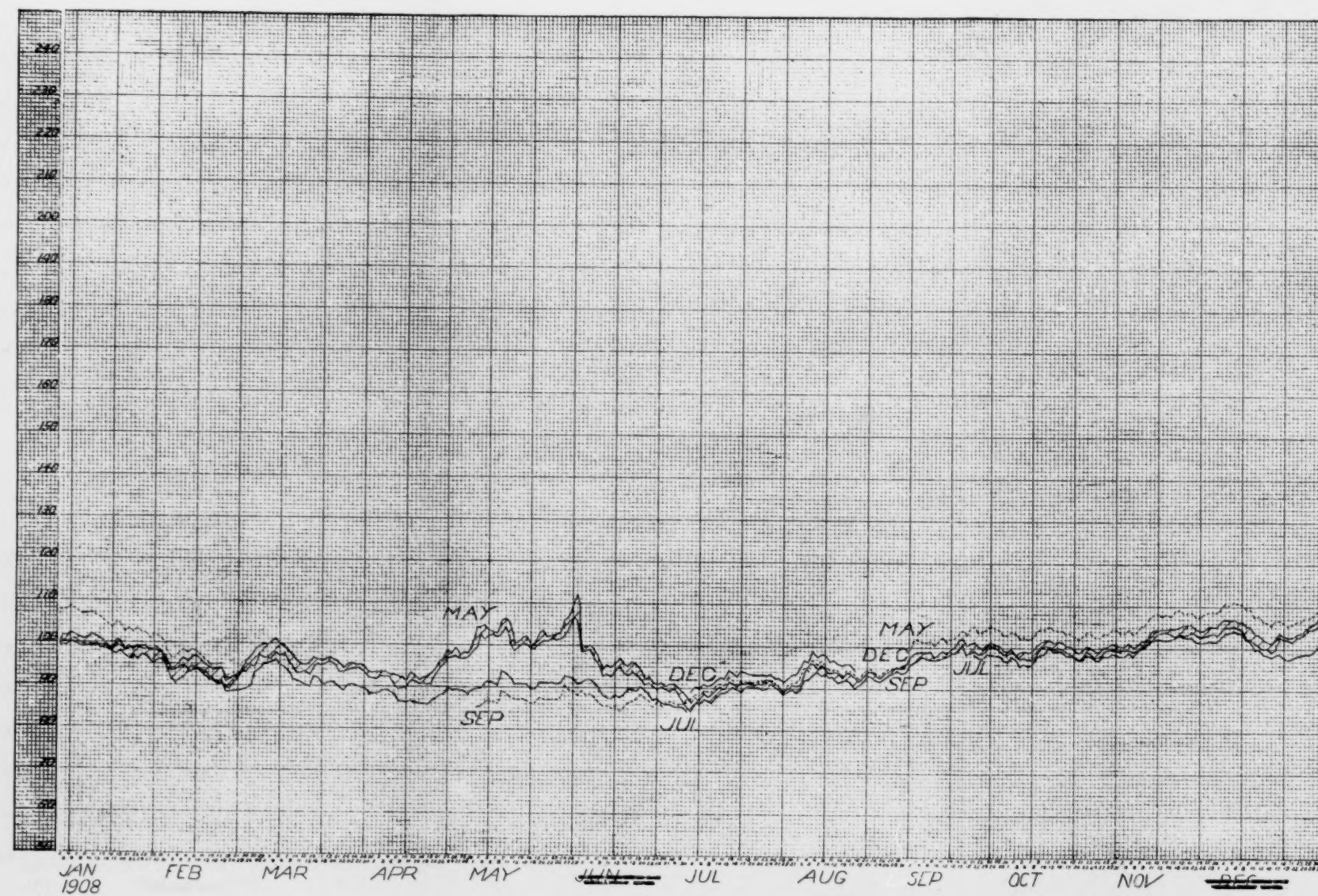


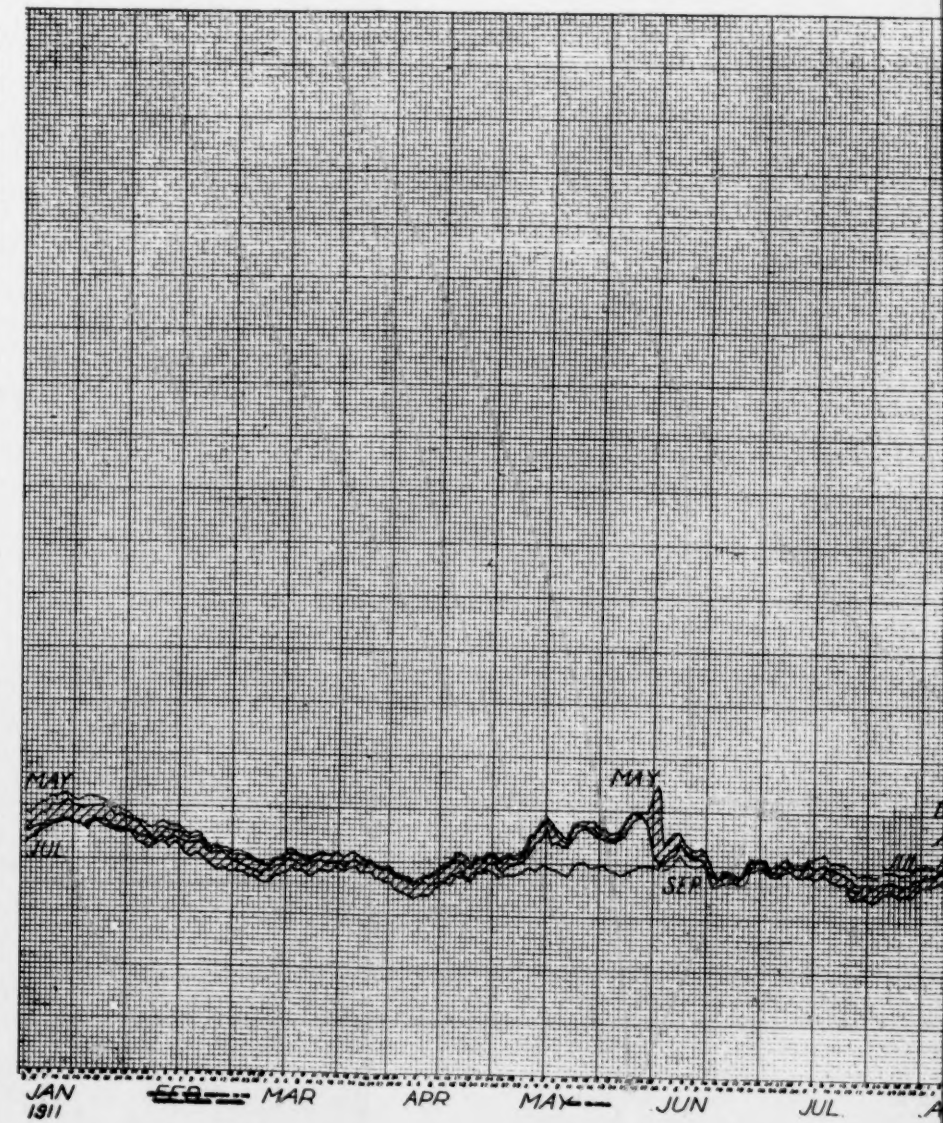
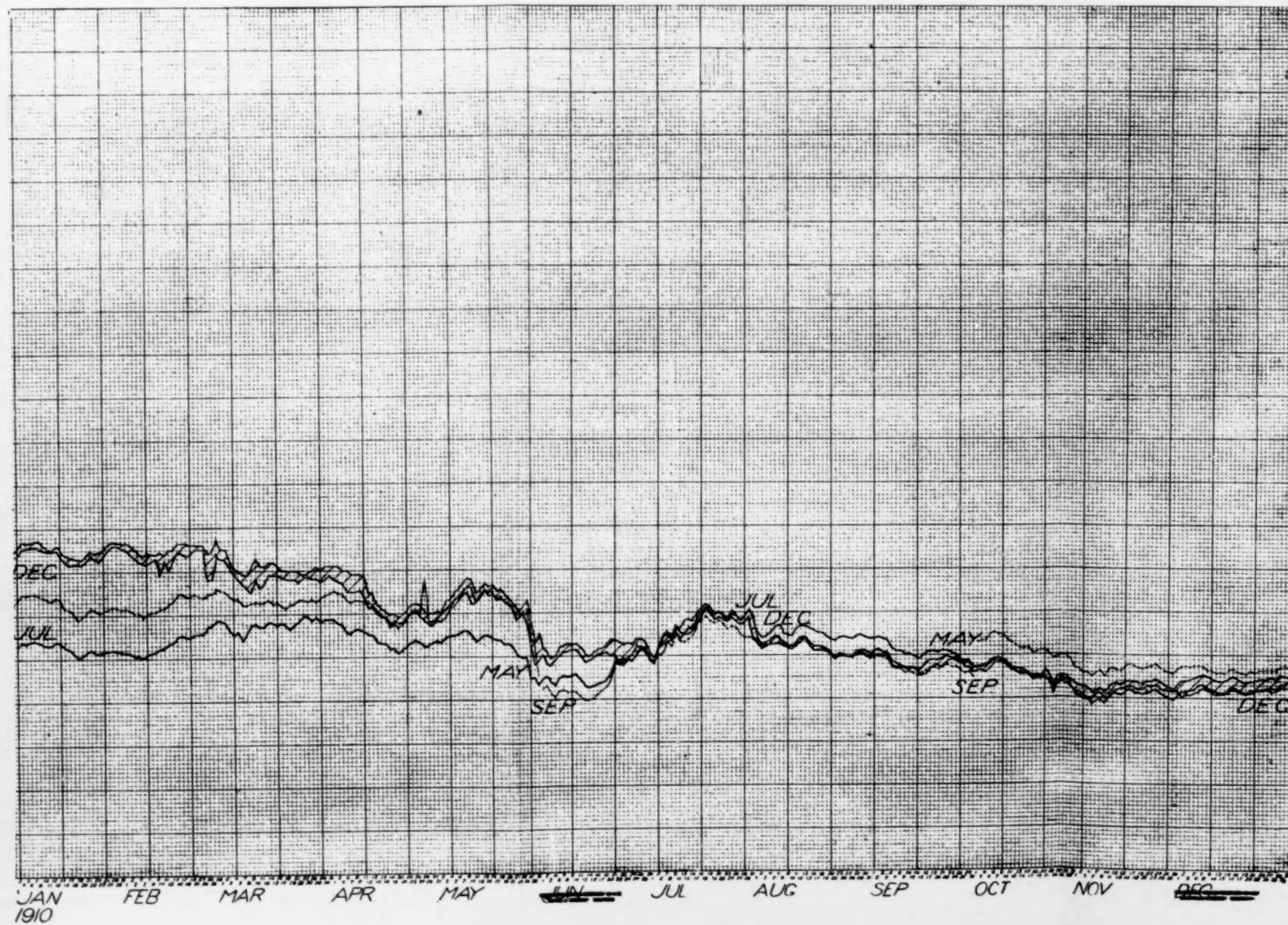
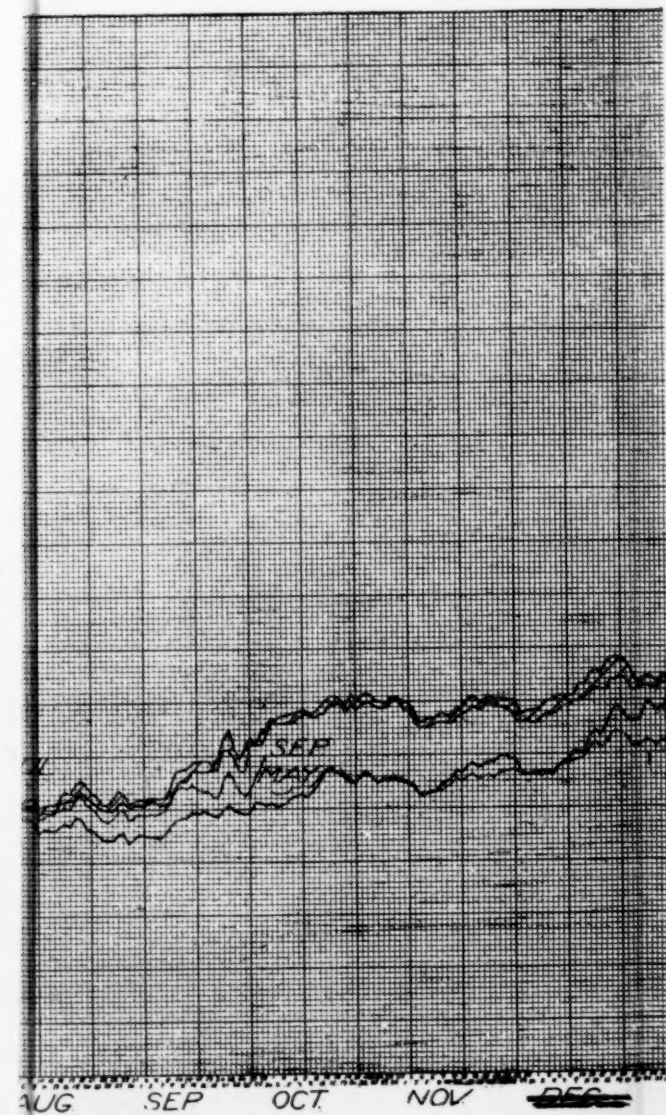


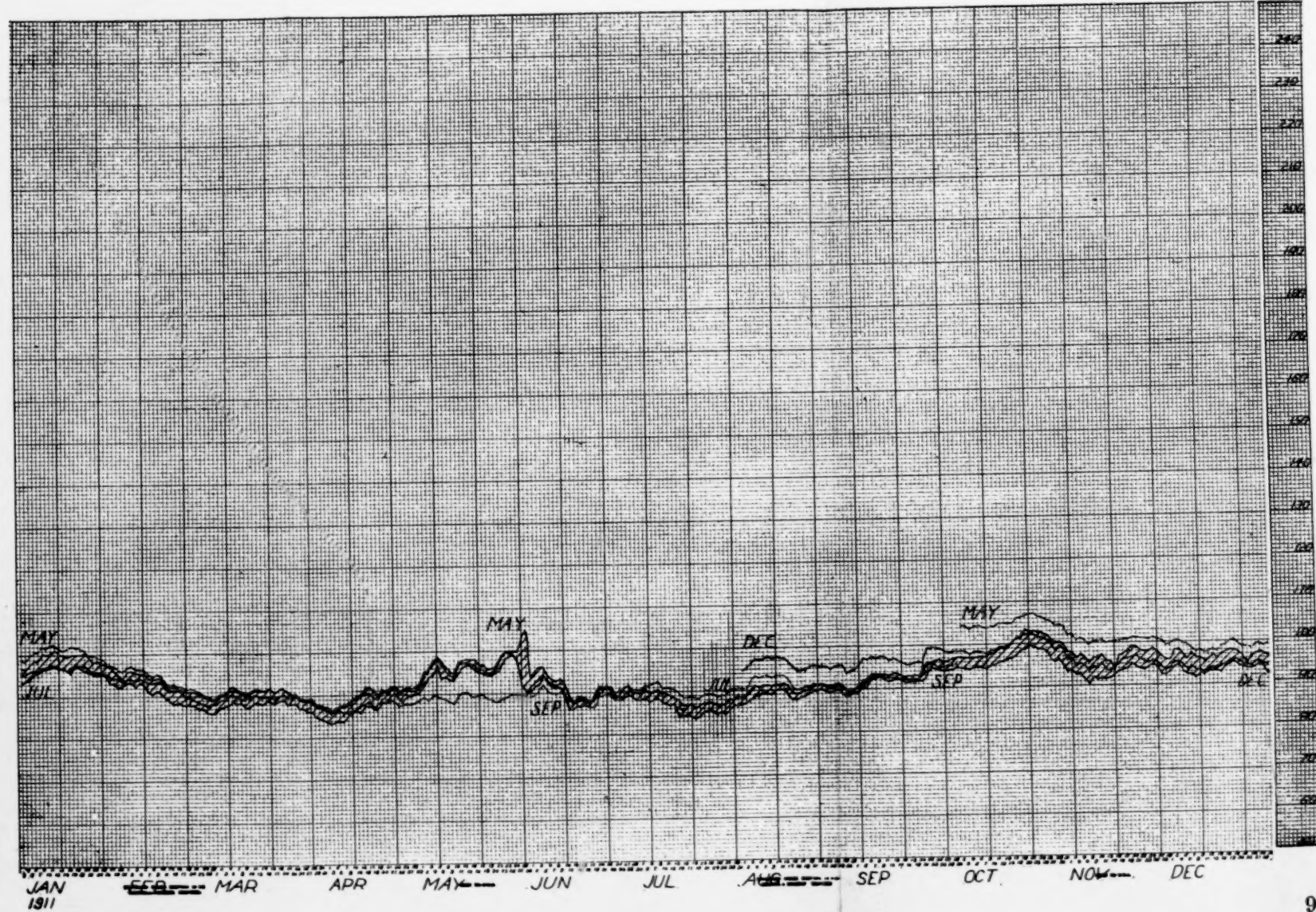
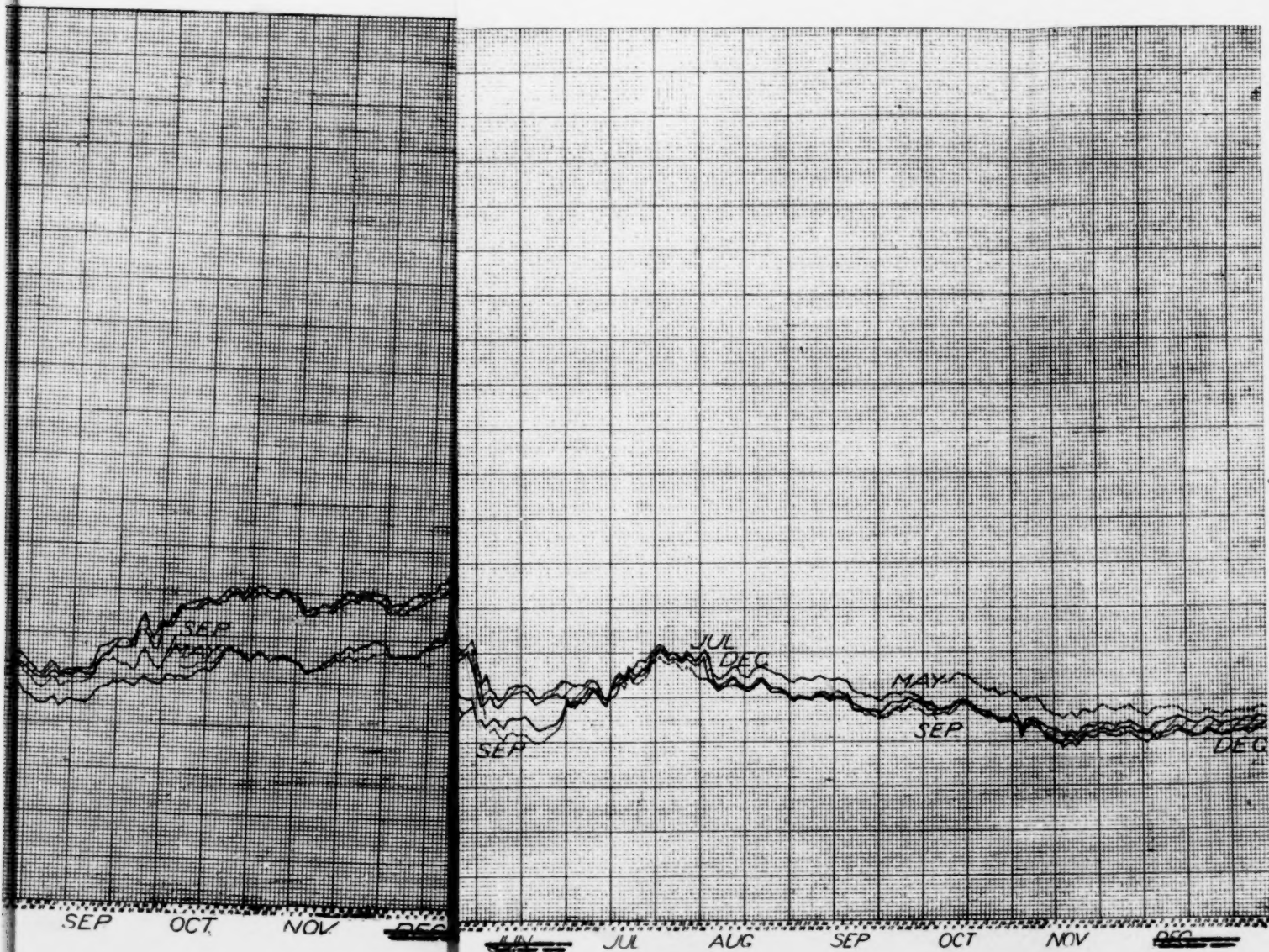


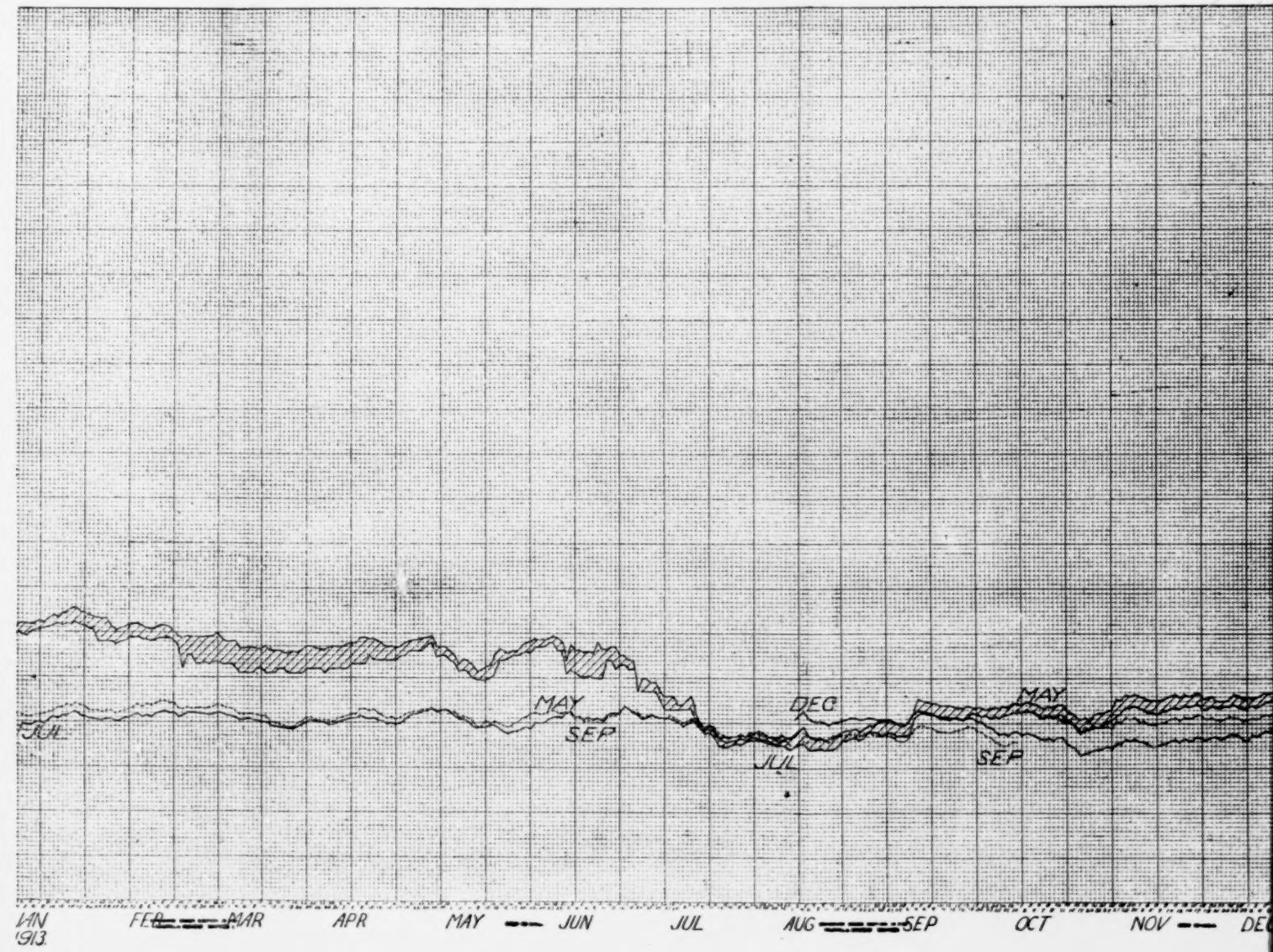
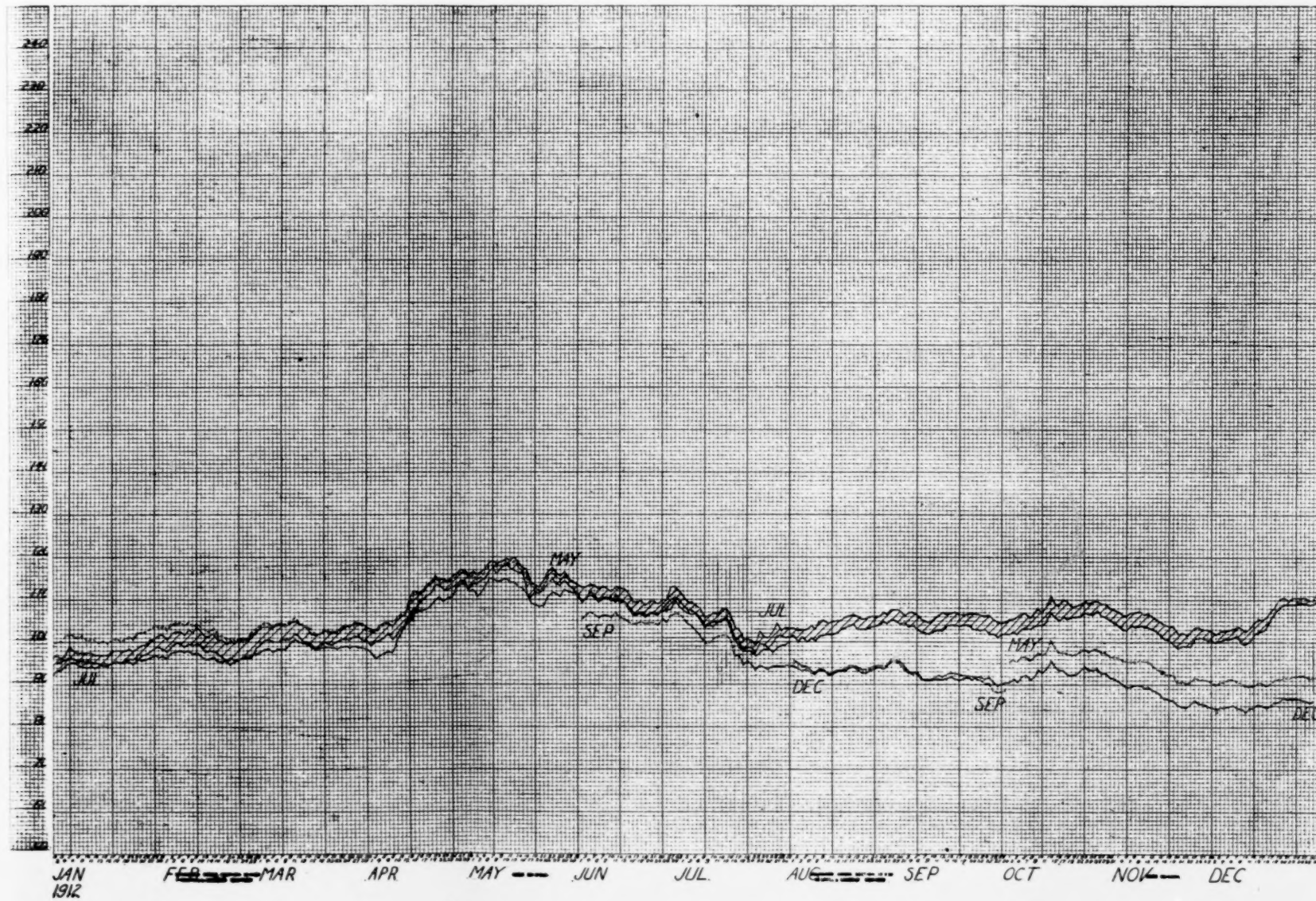


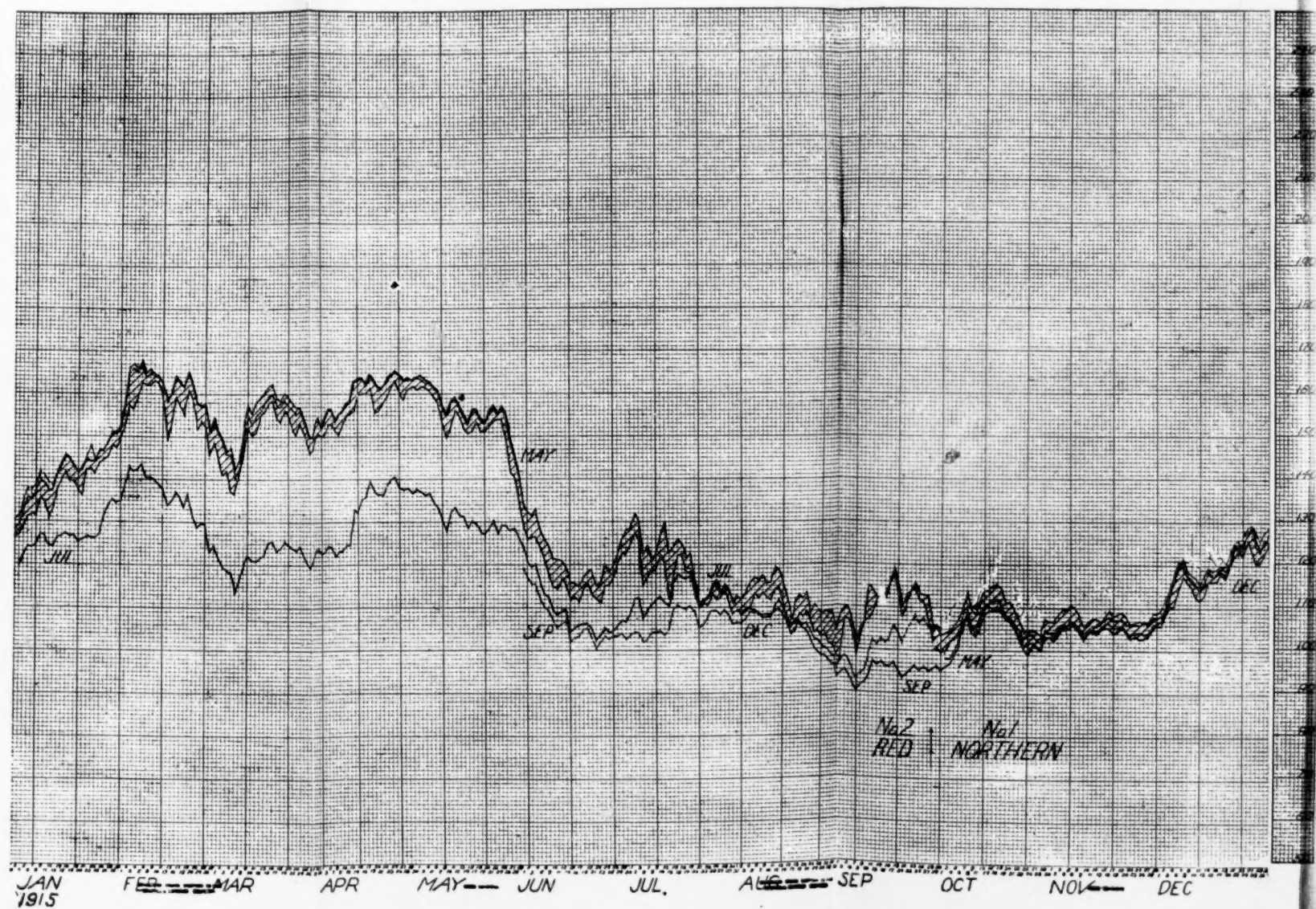
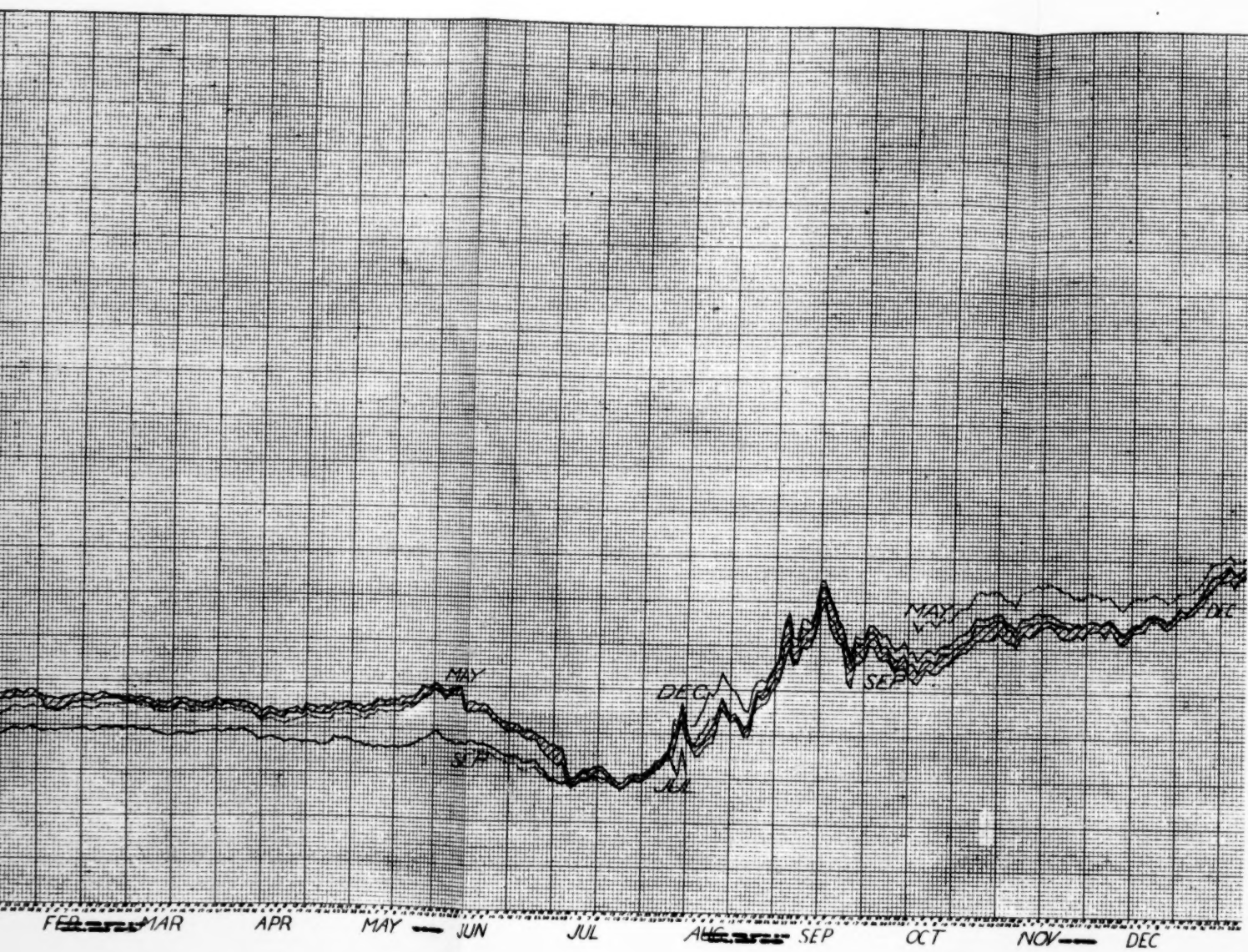


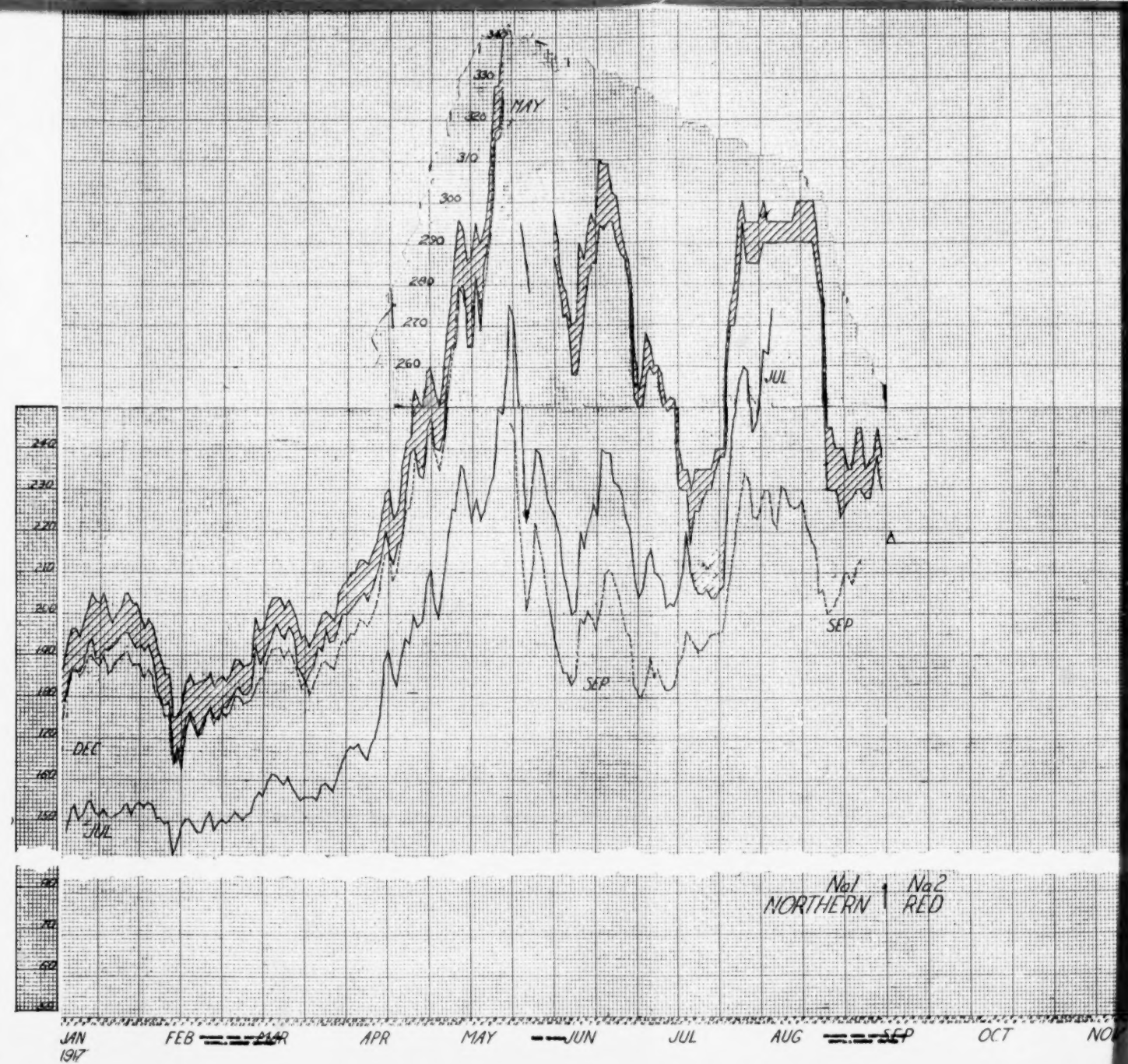
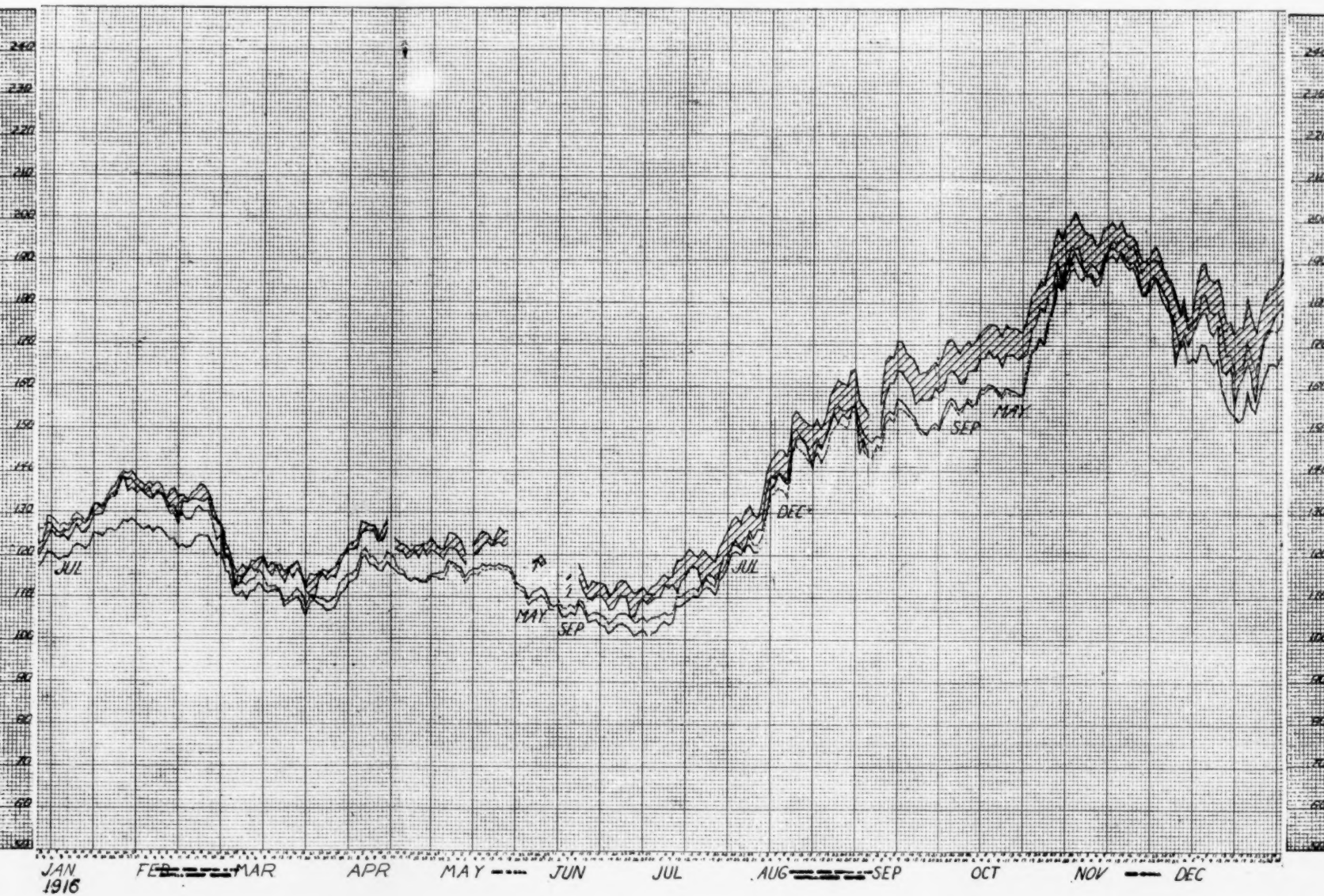


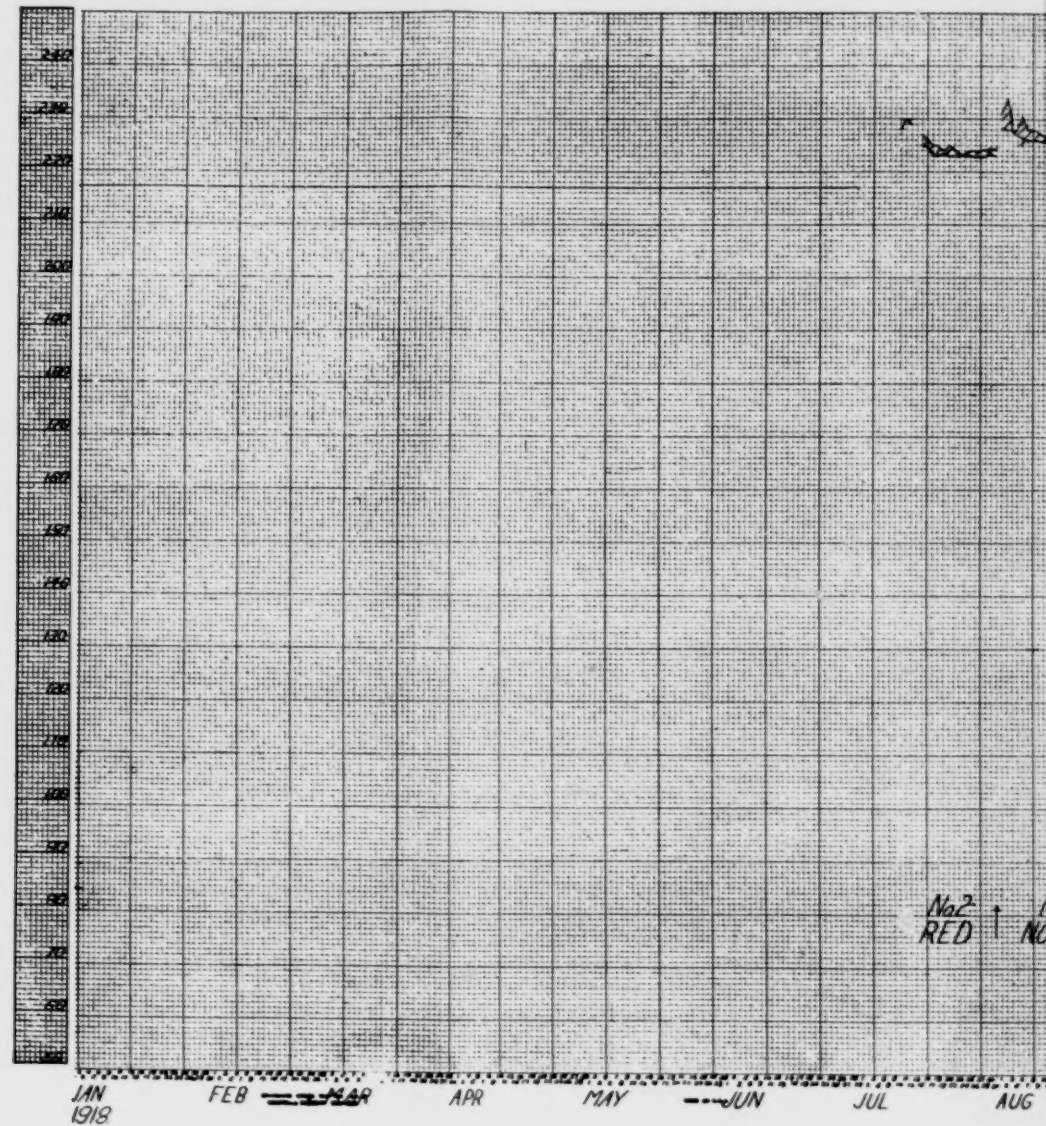
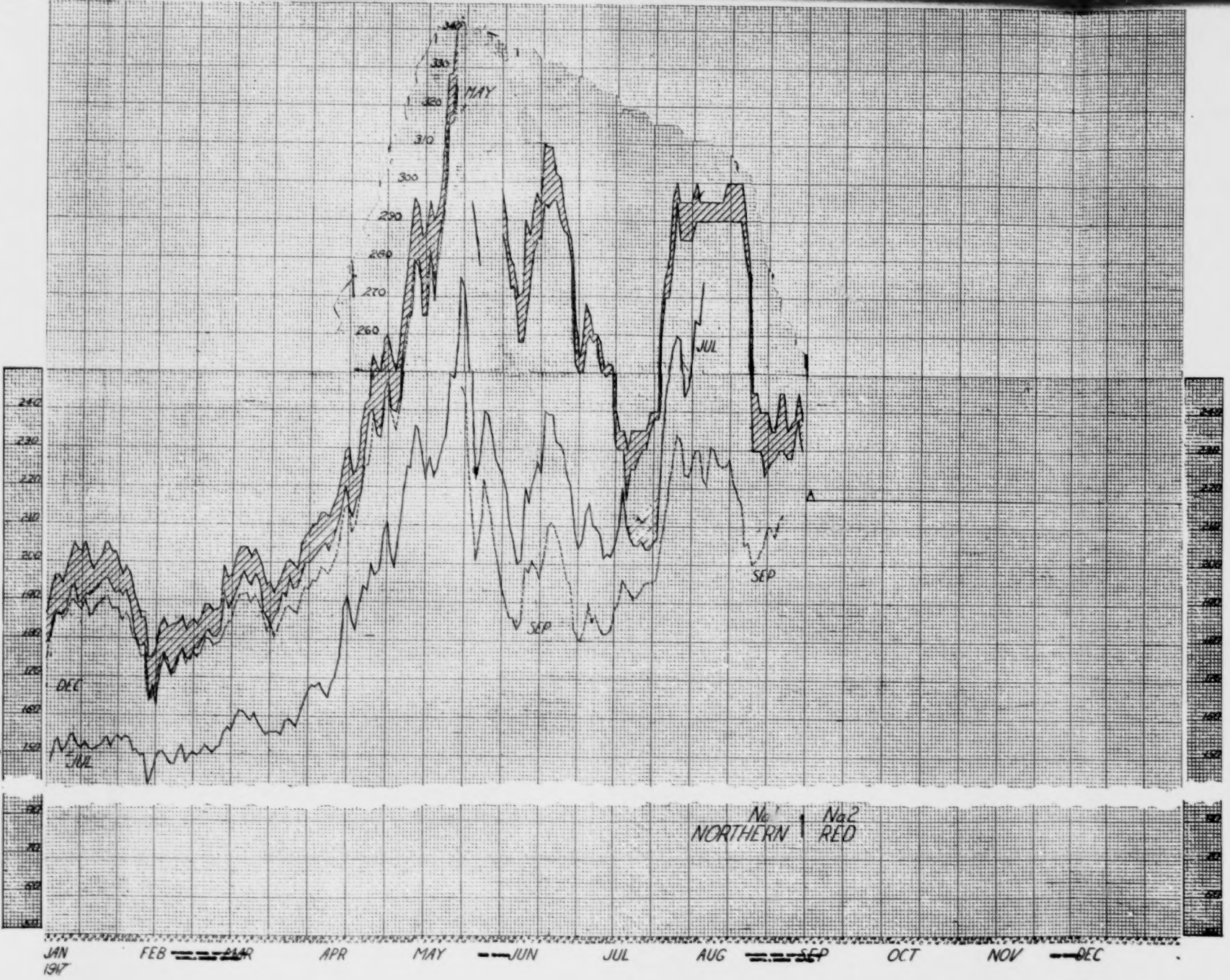


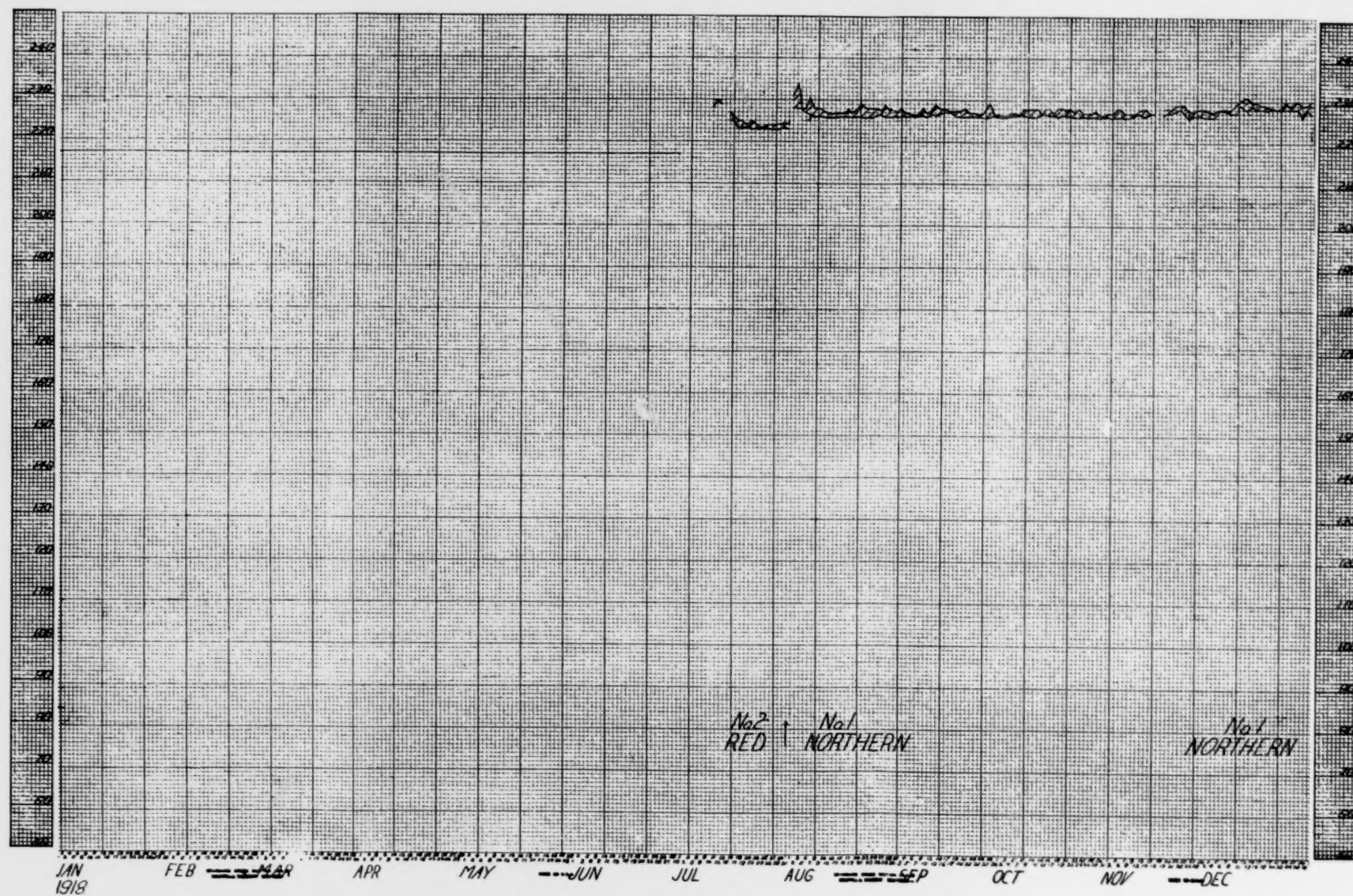
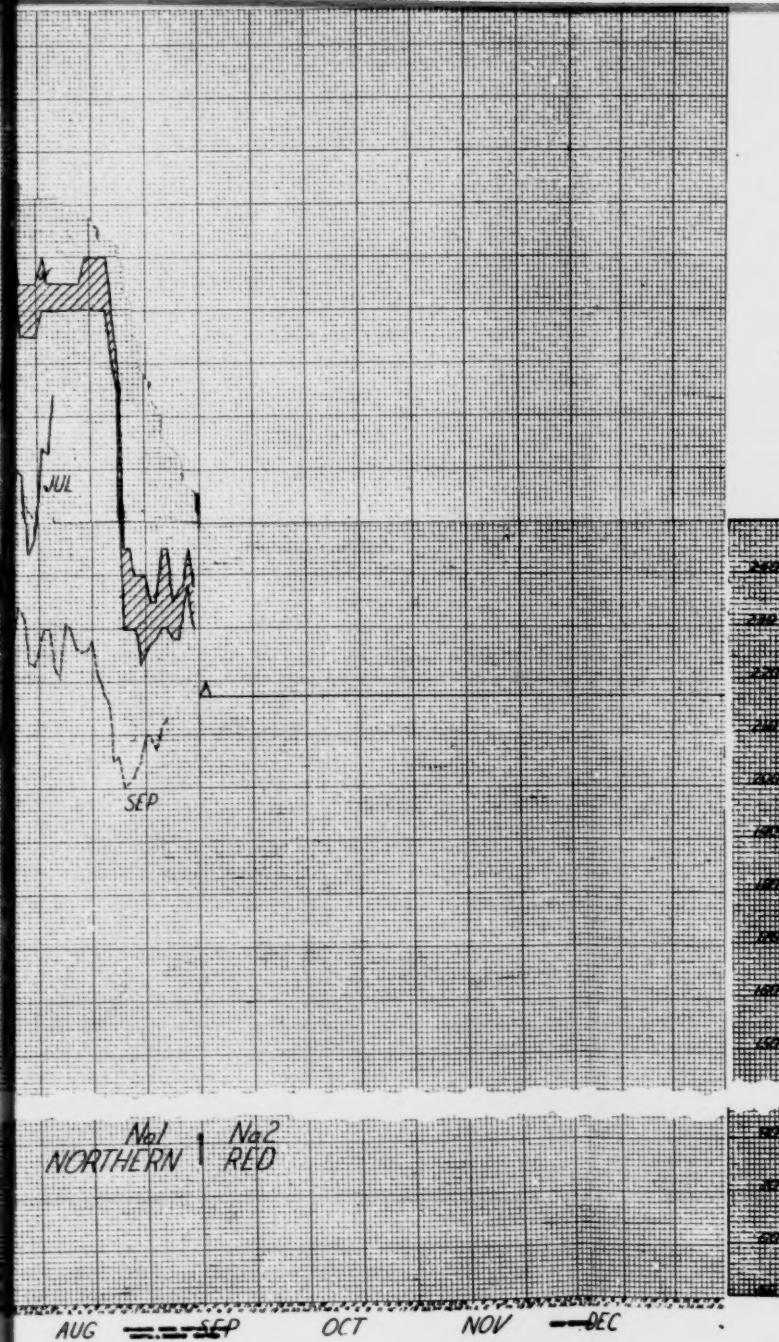


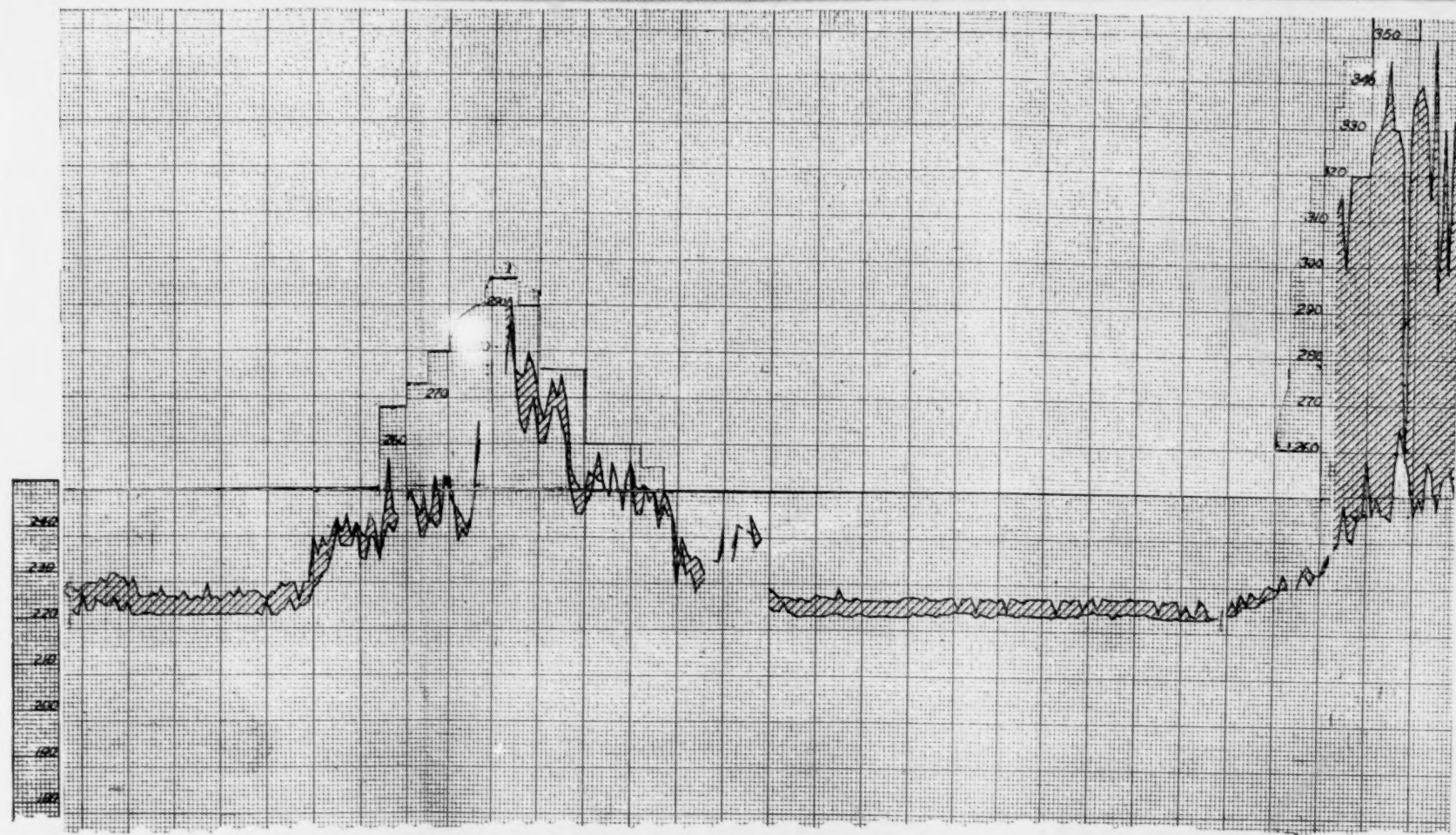




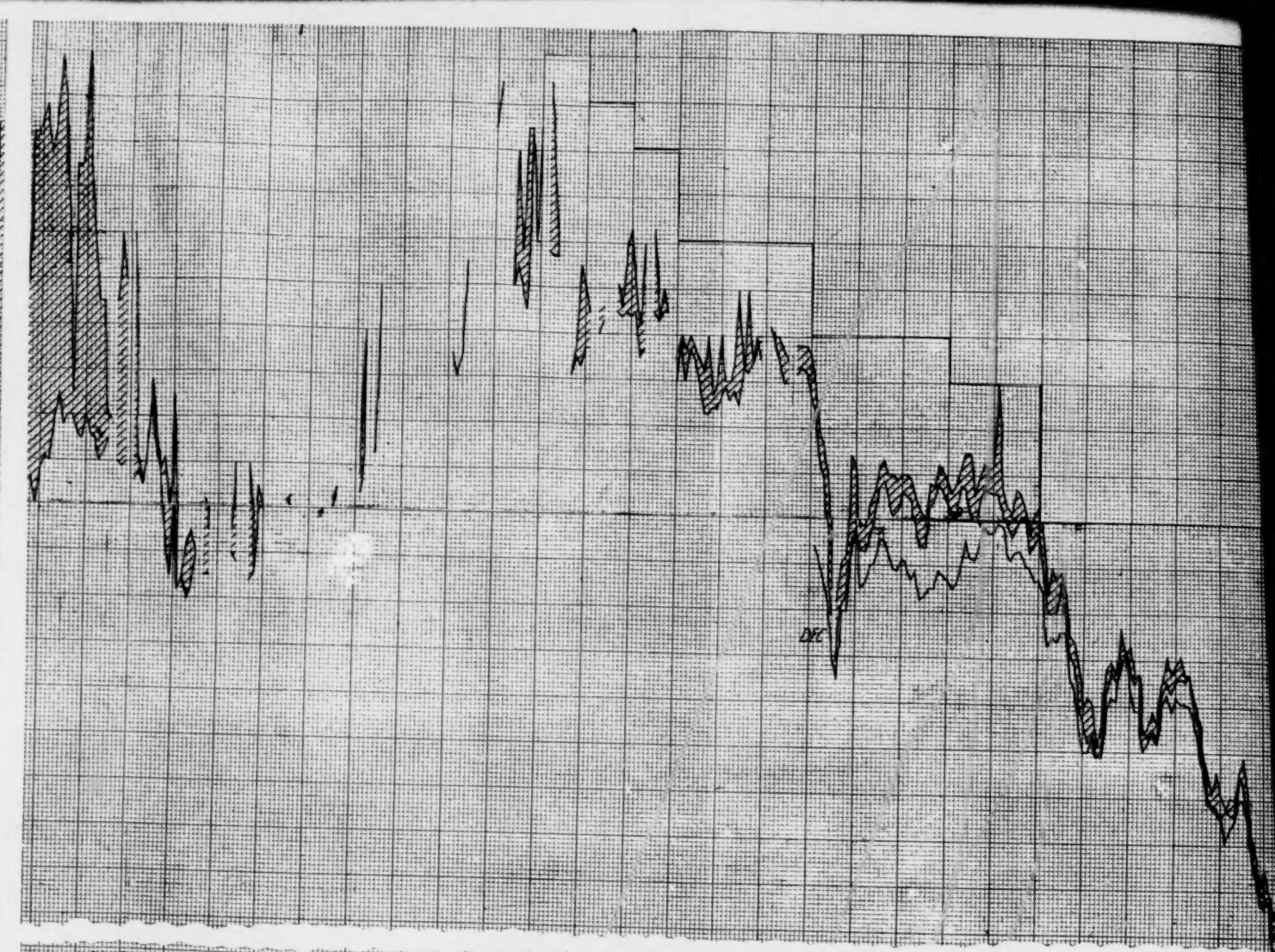




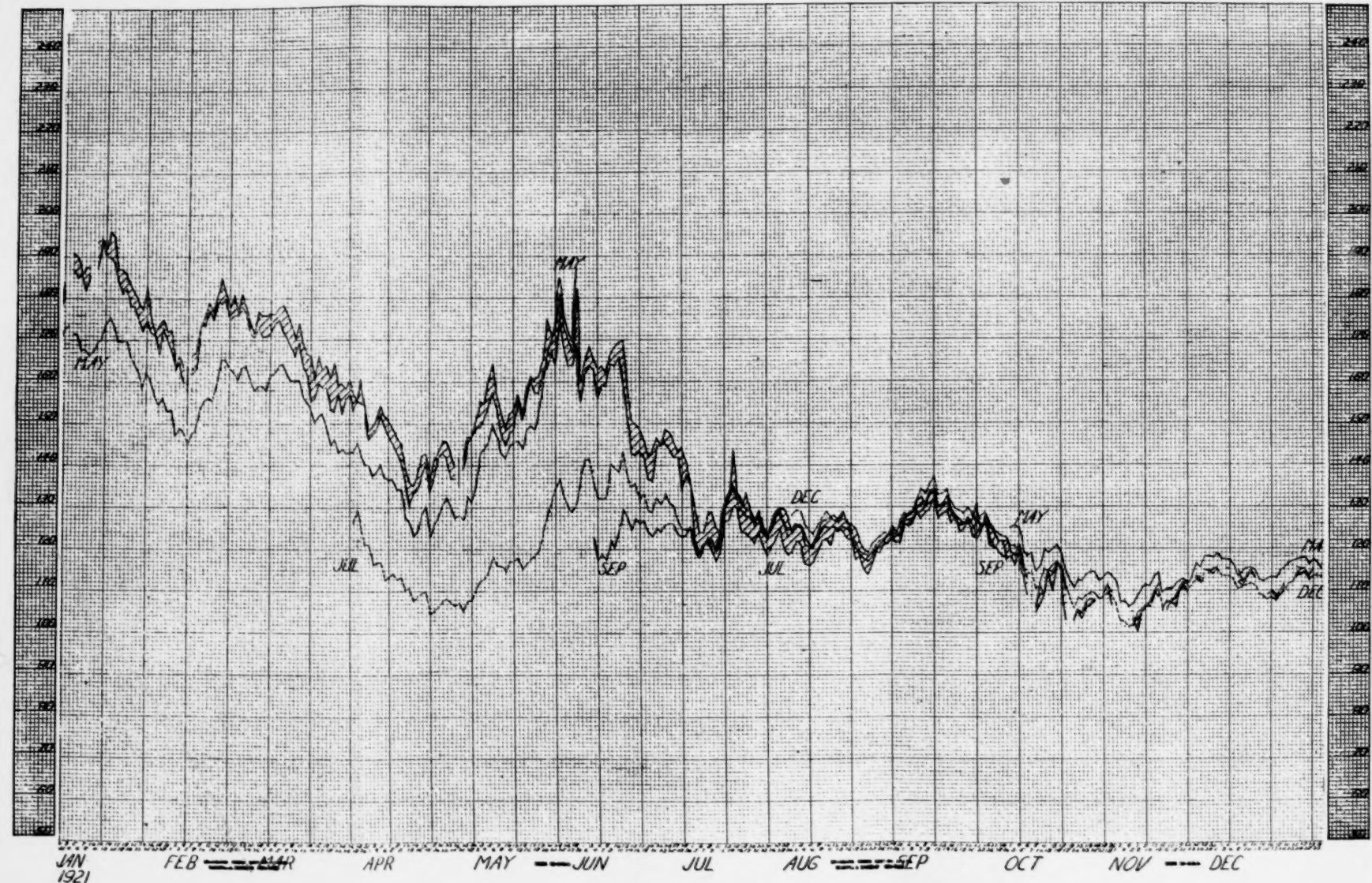
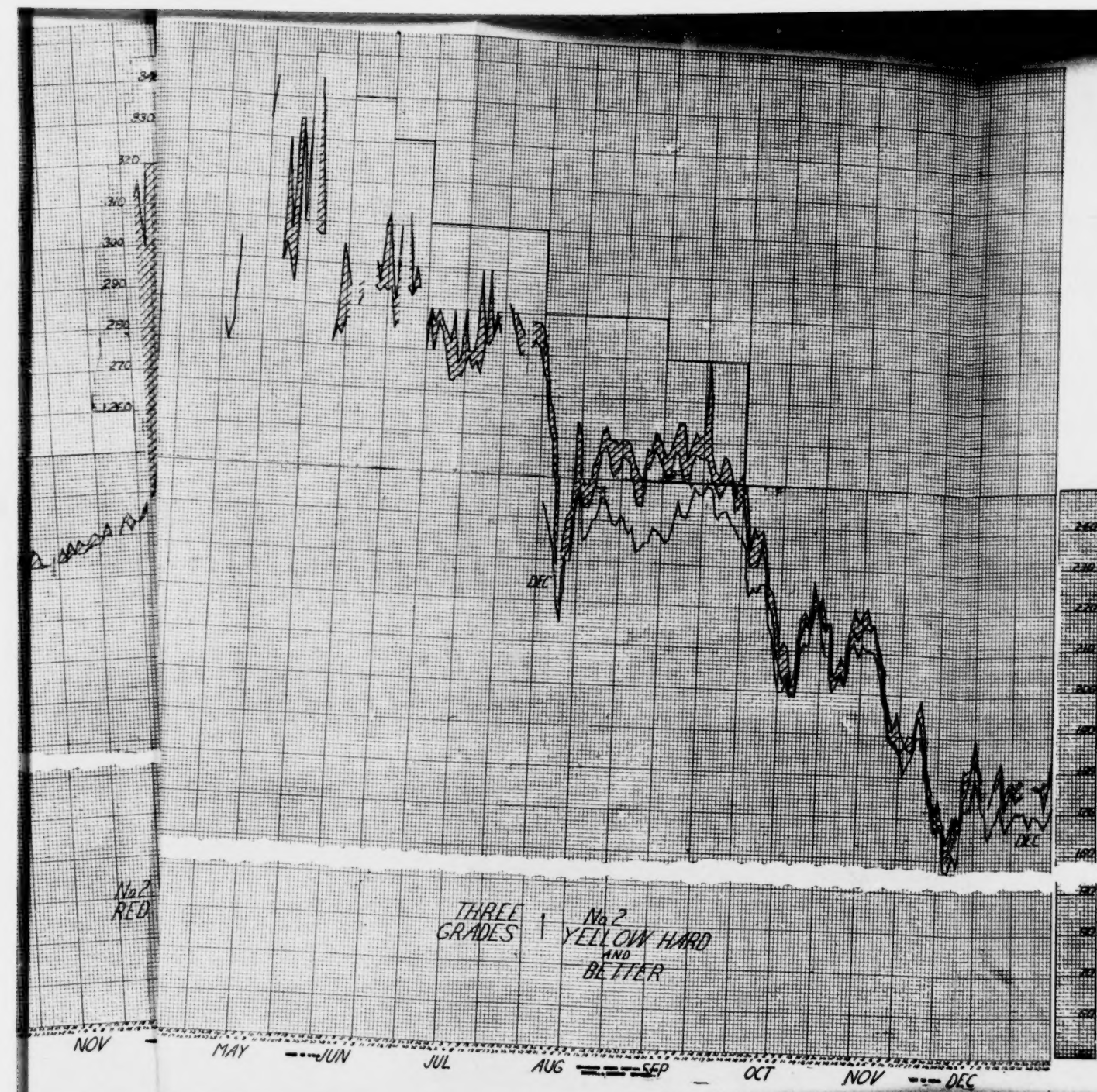




Na₂ NORTHERN AND BETTER
 Na₂ NORTHERN
 Na₂ RED AND BETTER
 Na₂ RED
 HIGHEST AND LOWEST PRICES
 JAN 1919 FEB ~~1919~~ APR MAY --JUN JUL AUG ~~1919~~ OCT NOV --DEC



Na₂ RED or Na₂ HARD Na₂ NORTHERN
 THREE GRADES
 Na₂ YELLOW HARD AND BETTER
 JAN 1920 FEB ~~1920~~ APR MAY --JUN JUL AUG ~~1920~~ SEP OCT NOV



Duluth:

Cars to boat:

Elevation: July 1, 1909-Aug. 31, 1910... $\frac{1}{2}$ cent per bu.
 Includes 15 days free storage
 Sep. 1, 1910-June 30, 1914..... 1 cent.

Lake Marine Insurance:

April 15-May 1..... 45 cents per \$100.
 May 1-Sep. 1..... 30
 Sep. 1-Nov. 30..... 45

Weighing and Inspection..... $\frac{1}{8}$ cent per bu.

Lake Freight rates to Buffalo:

July-Nov., 1909. 1 cent to 3 cents. Average 2 cents per bu.

Season 1910...1	.....2	.....$1\frac{1}{2}$
Season 1911... $\frac{3}{4}$	.....3	.....$1\frac{1}{2}$
Season 1912... $1\frac{1}{8}$	.....4	.....$2\frac{1}{4}$
Season 1913... $1\frac{1}{8}$	.....$3\frac{3}{4}$	.....2
Season 1914... $\frac{3}{4}$	.....3	.....$1\frac{1}{2}$

81 EXHIBIT C TO THE AFFIDAVIT OF JAMES E. BOYLE,
 Showing Cash Wheat Prices in Chicago from 1841 to 1921 Both
 Inclusive.

(Here follows said exhibit, marked pages 81-93.)

(Endorsed:) Filed Nov. 6, 1922. John H. R. Jamar, Clerk.

94 And afterwards to-wit: the sixth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following, to-wit:

95 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

VS.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
State of Illinois,
County of Cook, ss:

Fred Emerson Clark, being first duly sworn, says that he is Associate Professor of Economics and Marketing in the Northwestern University School of Commerce, and is in charge of the branch of political economy which includes the marketing of grain; that he has been, at different times, instructor of economics at the University of Arizona; assistant professor of business administration at Delaware College, and associate professor of economics at the University of Michigan; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation; and that he has written a book, published by the Macmillan Company, 1922, entitled, "Principles of Marketing."

That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the normal opera-

tion of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

FRED E. CLARK.

Subscribed and sworn to before me this 31st day of October, 1922.

[SEAL.]

A. S. PAPENGUTH,

Notary Public.

(Endorsed:) Filed Nov. 6, 1922. John H. R. Jamar, Clerk.

97 And on the same day to-wit: the sixth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit in words and figures following to-wit:

98 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

Arthur Twining Hadley, being duly sworn, says that he was for thirteen years professor of political economy in Yale University, and was in charge of the branch of political economy which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges reflect actual supply and demand influences.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain, as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, are relatively infrequent; that the general tendency of such future trading has not been, as a rule, detrimental to the producer or the consumer, but that it has tended to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges is an assistance to interstate commerce instead of an obstruction hereto or burden thereon.

Further affiant saith not.

ARTHUR TWINING HADLEY.

Subscribed and sworn to before me this 4th day of November, 1922.

[SEAL.]

EDNA MAY RUTZ,
Notary Public.

(Endorsed:) Filed Nov. 6, 1922. John H. R. Jamar, Clerk.

100 And on the same day to-wit: the sixth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit in words and figures following to-wit:

101 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

Henry W. Farnam, being duly sworn, says that he is Professor Emeritus of economics in Yale University.

That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with occasional exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

Further affiant saith not.

HENRY W. FARNAM.

Subscribed and sworn to before me this 4th day of November, 1922.

[Notarial Seal.]

EDNA MAY RUTZ,
Notary Public.

(Endorsed:) Filed Nov. 6, 1922. John H. R. Jamar, Clerk.

102 And on to-wit: the sixth day of November, 1922, there was filed in the Clerk's office of said court a certain affidavit, in words and figures following to-wit:

103 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

Fred Rogers Fairchild, being duly sworn, says that he is Professor of political economy in Yale University, and Chairman of the department of political economy, being the department which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

104 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

105 Further affiant saith not.

FRED ROGERS FAIRCHILD.

7-701

Subscribed and sworn to before me this 4th day of November, 1922.

[Notarial Seal.]

EDNA MAY RUTZ,
Notary Public.

(Endorsed:) Filed Nov. 6, 1922. John H. R. Jamar, Clerk.

106 And on to-wit: the sixth day of November, 1922, there was filed in the Clerk's office of said court a certain affidavit, in words and figures following to-wit:

107 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complain-
ants,

VS.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

Thomas S. Adams, being duly sworn, says that he is professor of political economy in Yale University; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

108 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges are, with infrequent and minor exceptions, the result of competitive forces of supply and demand, and that the general course of such prices is in no material degree affected by manipulation of prices on grain future exchanges.

That this affiant is further of the opinion that violent or unreasonable fluctuations in prices of grain do not frequently occur as the result of manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not in the aggregate detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and hold fluctuations in grain prices within a narrower compass or spread than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed but facilitates and gives precision to the operation of the normal forces of supply and demand, and that neither such future trading nor such fluctuations in prices

of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

THOMAS S. ADAMS.

Subscribed and sworn to before me this 4th day of November, 1922.

[Notarial Seal.]

EDNA MAY RUTZ,
Notary Public.

(Endorsed:) Filed Nov. 6, 1922. John H. R. Jamar, Clerk.

And on to-wit: the tenth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
State of New York,
County of Westchester, ss:

Roswell C. McCrea, being duly sworn, says that he is professor of economics in the School of Business of Columbia University, the curriculum of which includes a consideration of the marketing of grain, and the problems associated therewith, including future trading and speculation; that he graduated from Haverford College with the degree of A. B. in 1897, that he received the degree of A. M. from Cornell in 1900, and the degree of Ph. D. from the University of Pennsylvania in 1901, that he was instructor of Economics at Trinity College in 1902-03, that he was Professor of Economics and Sociology at Bowdoin College in 1903-07, that he was Associate Director of the New York School of Philanthropy from 1907-1911 where he taught Economics, that he was Professor of Economics at the University of Pennsylvania from 1911-1916, and Dean of the Wharton School of Finance and Commerce from 1912 to 1916, that he was Secretary of the Academy of Political Science for three years.

That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with temporary exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future

exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

113

Further affiant saith not.

ROSWELL C. McCREA.

Subscribed and sworn to before me this 31st day of October, 1922.
(Notarial Seal) CHARLES S. DANIELSON,

Notary Public.

Notary Public, Westchester County.

Certificate, New York County No. 91, New York Register No. 3090.
Term Expires March 30, 1923.

(Endorsed:) Filed November 6, 1922. John H. R. Jamar, Clerk.

114 And on to-wit: the tenth day November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following, to-wit:

115 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,

State of New York,

County of New York, ss:

Joseph French Johnson, being duly sworn, says that he is Dean of New York University School of Commerce and Professor of Po-

litical Economy in New York University, and in charge of the branch of political economy which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

MURRAY ELLMAN, [Notarial Seal.]
Notary Public, N. Y. Co., No. 5.

N. Y. Register's No. 3038.

116 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

JOS. FRENCH JOHNSON.

Subscribed and sworn to before me this 2nd day of November, 1922.

MURRAY ELLMAN, [Notarial Seal.]
Notary Public.

Notary Public, N. Y. Co. No. 5.
 N. Y. Register's No. 3038.

(Endorsed:) Filed Nov. 6, 1922. John H. R. Jamar, Clerk.

117 And on to-wit: the tenth day of November, 1922, there was filed in the Clerk's office of said court a certain affidavit, in words and figures following to-wit:

118 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Abbott Payson Usher, being duly sworn, says that he is Assistant Professor of political economy in Harvard University, and in charge of the branch of political economy which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation. That he has written the following:

History of the Grain Trade in France, 1400-1700. Harvard U Press;

Technique of Medieval & Modern Produce Markets (wording of title from memory). Journal of Political Economy;

Influence of Speculation on Prices. American Economic Review, and others.

119 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted

operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

120 Further affiant saith not.

ABBOTT PAYSON USHER.

MIDDLESEX,

Cambridge, Mass., ss:

Subscribed and sworn to before me this eighth day of November, 1922.

[Notarial Seal.]

GEORGE McCRAM,

Notary Public.*

*My commission expires April 14, 1927.

(Endorsed: Filed Nov. 10, 1922. John H. R. Jamar, Clerk.

121 And on to-wit: the tenth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

122 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Thomas N. Carver, being duly sworn, says that he is Professor of political economy in Harvard University, and in charge of the branch of political economy known as the Economics of Agriculture, which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation, that he is the author of books entitled Principles of Rural Economics, The Distribution of Wealth, Principles of National Economy, and several others.

123 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do at any given time reflect the actual supply and demand influences, in so far as they are known at the time to the best experts, and that such prices are, with infrequent and minor exceptions, determined by open and competitive buying and selling, and that manipulation of prices of grain, either for present or future delivery, is therefore impossible except in the rare, and increasingly rare cases known as cornering the market.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation, manipulation or control of prices, and that such fluctuations as do occur in the prices of grain bought and sold for future delivery are, in the main, due to new information regarding the conditions of demand and supply, that such fluctuations cannot be detrimental to the producer and the miller at the same time, the loss to one being offset by a gain to the other, unless it can be shown that the spread between the price received by the producer and the price paid by the miller is widened as the result of such speculation or such buying and selling of grain for future delivery, that there is no evidence to show that the spread between the price received by the producer and the price paid by the miller is
124 thereby widened, but on the contrary, the evidence seems to show that this spread is reduced and that this has been the general tendency for several decades.

That this affiant is further of the opinion that fluctuations in the price of grain are not increased in violence or frequency as the result of speculation or buying and selling for future delivery, but that on the contrary, such buying and selling for future delivery have a marked tendency to stabilize market prices of grain and to cause the fluctuations in the prices of grain to become less sudden and less violent than they would otherwise be, and less sudden and less violent than they were before such future trading became a practice on the exchanges.

And that this affiant is further of the opinion that the buying and selling of grain for future delivery on the exchanges do not result in and have the effect of causing the price of grain to be abnormally depressed on the one hand or abnormally raised on the other, nor to be other than such as results from the unrestricted operation of the normal forces of supply and demand, as those are understood by expert buyers and sellers at the time, and that neither such future trading nor any fluctuations in prices of grain as might conceivably occur as the result of such future trading are an obstruction to or burden upon interstate commerce in grain or in the products or by products thereof.

Further affiant saith not.

THOMAS N. CARVER.

Subscribed and sworn to before me this 8th day of November, 1922.
[Notarial Seal.]

HUGH LESTER,

Notary Public.

(Endorsed:) Filed Nov. 10, 1922. John H. R. Jamar, Clerk.

125 And on to-wit: the tenth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

126 In the District Court of the United States, Northern District of Illinois Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

VS.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Allyn A. Young, being duly sworn, says that he is Professor of political economy in Harvard University, and in charge of the branch of political economy which includes the study of organized exchanges; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

127 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not generally detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

128

Further affiant saith not.

ALLYN A. YOUNG.

MIDDLESEX,
Cambridge, Mass., ss:

Subscribed and sworn to before me this eighth day of November, 1922.

[SEAL.]

GEORGE W. CRAM,
Notary Public.

My commission expires April 14, 1927.

(Endorsed:) Filed Nov. 10, 1922. John H. R. Jamar, Clerk.

129 And on to-wit: the tenth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit in words and figures following to-wit:

130 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Melvin T. Copeland, being duly sworn, says that he is Professor of Marketing in Harvard University, and in charge of the course of instruction in the Graduate School of Business Administration which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation; and that he has written a text book, entitled "Marketing Problems," which is used as a standard text in Harvard University and other institutions.

131 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate com-

merce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

MELVIN T. COPELAND.

MIDDLESEX,

Cambridge, Mass., ss:

Subscribed and sworn to before me this eighth day of November, 1922.

[SEAL.]

GEORGE W. CRAM,

Notary Public.

My commission expires April 14, 1927.

(Endorsed:) Filed Nov. 10, 1922. John H. R. Jamar, Clerk.

And on to-wit: the tenth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit in words and figures following to-wit:

In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,

District of New Jersey, ss:

Frank A. Fetter, being duly sworn, says that he is a professor of political economy in Princeton University, and has given particular attention to the study of markets, of price changes and of price theory.

That he is of the opinion that the organized grain exchanges constitute the best agency that has yet been devised for reflecting at one time and place the manifold influences that go to make up true market prices whether for cash or future sales; and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that

the general course of prices on grain future exchanges is not properly to be explained as due to manipulation.

That this affiant is further of the opinion that there is widespread misunderstanding as to the effect that trading in grain for future delivery does or can have upon prices of grain sold for immediate delivery; that these two prices, or sets of prices, relate to different periods of time with all their differing conditions; that groups of commodities physically alike and sold at the same time but deliverable at two different times, are virtually two different commodities for the purpose of the price-making process, though related to each other as in the case of any two commodities that can be substituted for each other within limits; that sudden fluctuations in the prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges; that such future trading, merely reflecting the forecasts and opinions of traders as to conditions, is not to be charged with causing the fluctuations or with any resulting detriment to producers, to consumers, or to dealers; that future trading in grain has a marked tendency to stabilize the movement of
 136 cash prices and to cause fluctuations to become less sudden and less violent than they were before such future trading became a practice upon such exchanges; and that the selling of grain for future delivery on the exchanges does not cause the average annual cash prices of grain to be depressed, but that such prices result from the ordinary operation of supply and demand.

Further affiant saith not.

FRANK A. FETTER.

Subscribed and sworn to before me this 6th day of November, 1922.

[SEAL.]

CHARLES E. VAN MARTER,

Notary Public for N. J.

(Endorsed:) Filed Nov. 10, 1922. John H. R. Jamar, Clerk

137 And on to-wit: the tenth day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit in words and figures following to-wit:

138 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

STATE OF NEW YORK,

County of Tompkins, ss:

James E. Boyle, being duly sworn, says that in the preparation of the five-year chart showing cash prices of grain in six markets,

which is attached to the affidavit heretofore made by this affiant in the above entitled cause, the Chicago prices indicated on said chart are the prices for No. 2 Red Winter Wheat, with the exception of the period from July 1, to July 15, 1909, when the price is for No. 1 Northern Spring Wheat; and that the Kansas City prices indicated on said chart are also for No. 2 Red Winter Wheat; and the New York prices thereon indicated are for No. 2 Red Winter Wheat f. o. b. ship at New York; and that the prices indicated on said chart for Winnipeg and Minneapolis are the prices for No. 1 Northern Spring Wheat; and that the price of No. 1 Spring Wheat is normally above the price of winter wheat because of the superior milling qualities which said spring wheat has.

Further affiant saith not.

JAMES E. BOYLE.

Subscribed and sworn to before me this 6th day of November, 1922.

[SEAL.]

JOHN G. GUDMUNDSEN,
Notary Public.

(Endorsed:) Filed Nov. 10, 1922. John H. R. Jamar, Clerk.

139 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

140 In the District Court of the United States, Northern District of Illinois, Eastern Division,

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,

State of New York,

County of New York, ss:

Charles J. Bullock, being duly sworn, says that he is professor of political economy in Harvard University, and in charge of the branch of political economy which relates to industry and commerce, including the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future ex-

changes has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur
141 as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, with an orderly system of marketing grain, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

CHARLES J. BULLOCK.

Subscribed and sworn to before me, this 9th day of November, 1922.

[Notary Seal.]

JOHN F. HENDRICKSON,
Notary Public.

Notary Public, Kings County #25.
Certificate Filed N. Y. County Clerk's — #567.
N. Y. Co. Register's Office 3281.
Commission Expires March 30, 1923.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamaar, Clerk.

142 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

143 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

VS.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss.:

Wesley C. Mitchell, being duly sworn, says that he is Professor of Economics in Columbia University; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

144 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not frequently detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become more frequent but also less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

145 Further affiant saith not.

WESLEY C. MITCHELL.

Subscribed and sworn to before me this 8 day of November, 1922.

[SEAL.]

JOHN GROENER,
Notary Public.

Notary Public, New York County.
New York County Clerk's No. 224.
New York Register's No. 4092.
Commission expires March 30th, 1924.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamar, Clerk.

146 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

147 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
State of New York,
County of Westchester, ss:

John Bates Clark, being duly sworn, says that he is, and has been since 1895, professor of Political Economy in Columbia University; and director of the Division of Economics and History of the Carnegie Endowment for International Peace since 1911; that he was a member of the Hughes Commission for Investigating Exchanges and that he is the author of works on Value and on the Distribution of Wealth; that he gives as his opinion the following:

148 In my opinion the free buying and selling of grain on the exchanges for future delivery has a steadying effect on the market. Were there no such dealing either on the exchanges or elsewhere, a short crop of wheat would at first be sold at too low a price. At the beginning of the season of the year following the harvest it would be consumed too freely and would command a scarcity price at the end of the year. An opposite effect would be created in the case of a large crop. In both cases the result of speculation involving the actual delivery of the grain bought and sold tends to lessen injurious fluctuations of price and cause the entire year's supply to command a rate that is less variable and more normal than it would otherwise be. No manipulations can annul this tendency.

And further affiant saith not.

JOHN B. CLARK.

Subscribed and sworn to before me this tenth day of November, 1922.

[SEAL.]

CHARLES S. DANIELSON,
Notary Public.

Notary Public Westchester County.
Certificate New York County No. 91,
New York Register No. 3090.
Term expires March 30, 1923.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamar, Clerk.

149 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

150 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Edwin R. A. Seligman, being duly sworn, says that he is McVicker Professor of Political Economy, and head of the Department of Economics at Columbia University of New York; that he has occupied a number of positions as advisory expert on economic questions of various official and governmental committees, commissions, and departments, local, state, and national; that he now occupies an official position as consulting expert on certain economic questions to an important committee of the League of Nations; that he is past president of the American Economic Association, of the National Tax Association, of the American Association of University Professors; that he is the American correspondent of the Royal British Economic Society and the American member of several other European learned associations; that his instruction includes the field of political economy which deals with the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and of the marketing problems associated therewith, including future trading and speculation; that he has treated of these subjects in his books, several of which have been translated into various European languages, including French, German, Spanish, Italian, Russian, Japanese, and Chinese; that he has read and carefully considered all the testimony taken at the hearings on future trading before the committees on agriculture of the House and Senate in 1921, preliminary to the passage of the

Grain Futures Act, and that he finds the overwhelming weight of evidence in that testimony to bear out the conclusions set forth below.

That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do in general reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations of prices in grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such rare fluctuations as do occur in prices in such future trading, due to manipulation or control, are of an entirely ephemeral character, without any permanent influence on either producer or consumer or the persons handling the grain or the products or by-products thereof in interstate commerce; that such rare fluctuations of prices due to manipulation or control, are far more than outweighed by the influence of the so-called hedging or trading in futures, which constitute the overwhelming mass of speculative transactions in grain

and which have, on the contrary, had a marked tendency to
152 stabilize market prices of grain and cause fluctuation in grain prices to become less sudden and less violent than they were before such future trading became a practice on such exchanges; and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor, as a rule and with infrequent and minor exceptions, to be other than such as result from the unrestricted operation of the natural law of supply and demand; and that neither such future trading nor such fluctuations in prices of grain, as do occur therein are an obstruction to, or burden upon, interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

EDWIN R. A. SELIGMAN.

Subscribed and sworn to before me this sixth day of November, 1922.

[Notarial Seal.]

GERTRUDE D. STEWART,

Notary Public, #45.

Commission expires March, 1923.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamar, Clerk.

153 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain affidavit, in words and figures following to-wit:

154 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Pennsylvania, ss:

Robert Riegel, being duly sworn, says that he is Professor of the branch of political economy which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

155 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

156 Further affiant saith not.

ROBERT RIEGEL.

Subscribed and sworn to before me this 6th day of November, 1922.
[SEAL.]

GEO. E. NITZSCHE,

Notary Public.

Notary Public.

Commission Expires January 18, 1925.

(Endorsed:) Filed November 13, 1922. John H. R. Jamar, Clerk.

157 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

158 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,

District of Pennsylvania, ss:

S. S. Huebner, being duly sworn, says that he is Professor in Organized Security and Produce Exchange Markets and political economy in the University of Pennsylvania, and in charge of the branch of political economy which includes the marketing of grain: that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

159 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect approximately actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to

be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

S. S. HUEBNER.

Subscribed and sworn to before me this 6th day of November, 1922.

[SEAL.]

GEORGE E. NITZSCHE,

Notary Public.

Notary Public.

Commission Expires January 18, 1925.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamar, Clerk.

161 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

162 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Pennsylvania, ss:

Grover G. Huebner, being duly sworn, says that he is Professor of Commerce and Transportation in the University of Pennsylvania, and in charge of the branch of political economy which includes the marketing of grain; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

163 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such

fluctuations as do occur in prices in such future trading are not detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that on the contrary such future trading has had a tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to or burden upon interstate

164 commerce in grain or in the products or by-products thereof.

Further affiant saith not.

GROVER G. HUEBNER.

Subscribed and sworn to before me this 6 day of Nov., 1922.
[Notarial Seal.]

WALTER K. TAYLOR,
Notary Public.

Walter K. Taylor, 3425 Woodland Avenue.
Commission expires January 4th, 1925.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamar, Clerk.

165 And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

166 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants

v.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Irving Fisher, being duly sworn, says that he is Professor of political economy in Yale University; that he has made a study of the production, exchange, and distribution of wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

167 That he is of the opinion that the prices of grain bought and sold on the organized grain exchanges do reflect actual supply and demand influences, and that such prices are, with infrequent and minor exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain

future exchanges has in general, little material effect on the general course of such prices.

That this affiant is further of the opinion that sudden or unreasonable fluctuations in prices of grain do not frequently occur as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and that such fluctuations as do occur in prices in such future trading are not usually detrimental to the producer or the consumer or the persons handling grain or the products or by-products thereof in interstate commerce, and that, on the contrary, such future trading has had a marked tendency to stabilize market prices of grain and cause fluctuations in grain prices to become less sudden and less violent than they were before such future trading became a practice upon such exchanges, and that the selling of grain for future delivery on the exchanges does not ordinarily result in or have the effect of causing the prices of grain to be abnormally depressed nor to be other than such as result from the unrestricted operation of the natural law of supply and demand, and that neither such future trading nor such fluctuations in prices of grain as do occur therein are ordinarily an obstruction to or burden upon interstate commerce in grain or in the products or by-products thereof.

Further affiant saith not.

IRVING FISHER.

Subscribed and sworn to before me this 8th day of November, 1922.

[Notarial Seal.]

M. A. PRENTISS,
Notary Public.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamar, Clerk.

And on to-wit: the 13th day of November, 1922, there was filed in the Clerk's office of said court a certain Affidavit, in words and figures following to-wit:

In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

UNITED STATES OF AMERICA,
District of New Jersey, ss:

Edwin Walter Kemmerer, being duly sworn, says that he is Professor of Economics and Finance in Princeton University; that he has made a study of the production, exchange and distribution of

wealth in the United States and the marketing problems associated therewith, including future trading and speculation.

171 That he is of the opinion that the general price movements of grain bought and sold on the organized exchanges (aside from temporary oscillations which are usually of minor proportions) reflect actual supply and demand influences, and that such price movements are, with infrequent exceptions, based on the open competitive factors of supply and demand, and that manipulation of prices on grain future exchanges has no material effect on the general price movements, although it frequently is a factor in causing temporary oscillations.

That this affiant is further of the opinion that substantial declines or advances of an enduring character rarely, if ever, occur, under modern exchange conditions, as the result of speculation or manipulation or control of prices in transactions in future trading upon such exchanges, and he believes that future trading has a marked tendency to stabilize market prices of grain in the sense of causing such fluctuations as take place to be less violent than they were before such future trading became a practice upon such exchanges, and he believes that the selling of grain for future delivery on the exchanges does not result in or have the effect of causing the prices of grain to be abnormally depressed, nor to average lower throughout the year than they would if such future trading upon the exchanges were abolished.

172 Further affiant saith not.

EDWIN WALTER KEMMERER.

Subscribed and sworn to before me this 6th day of November, 1922.

[SEAL.]

CHARLES E. VAN MARTER,
Notary Public for N. J.

(Endorsed:) Filed Nov. 13, 1922. John H. R. Jamar, Clerk.

173 And afterwards on, to wit, the 17th day of November, 1922, this matter coming on to be heard, the following Decree was entered by the Court:

174 In the District Court of the United States, Northern District of Illinois, Eastern Division.

Friday, November 17, 1922.

Present: Honorable George A. Carpenter, District Judge.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

Decree.

This cause came on to be heard at this term on a motion for a temporary injunction (but not upon final hearing on bill and answer), and was argued by counsel, thereupon, upon consideration thereof, now

It is ordered That the motion for a temporary injunction be denied; and

It is further ordered, adjudged and decreed, upon the court's own motion, that the bill be dismissed as to all the defendants for want of equity.

17 Nov. 1922.

CARPENTER,
Judge.

175 And on, to wit, the 17th day of November, 1922, came the complainants by their solicitors and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

176 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

Petition for Allowance of Appeal.

The Board of Trade of the City of Chicago, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord, complainants in the above entitled cause, conceiving themselves to be aggrieved by the decree of this court entered on the 17th day of November, 1922, dismissing the above entitled suit, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of error this day filed herein, and they pray that this

appeal may be allowed and that a transcript of the record and all proceedings herein be forthwith transmitted to said court, and that the temporary restraining order issued herein be continued in force for the purpose of enabling said complainants to apply to the Supreme Court of the United States for the further continuance of said restraining order.

BOARD OF TRADE OF THE CITY OF
CHICAGO,

JOHN HILL, Jr.,
REUBEN G. CHANDLER,
ADOLPH KEMPNER,
EMIL W. WAGNER,
ALFRED V. BOOTH,
EDWARD L. GLASER,
ALONZO B. LORD,

By ROBBINS, TOWNLEY & WILD,
Their Solicitors.

(Endorsed:) Filed Nov. 17, 1922. John H. R. Jamar, Clerk.

178 And on, to wit, the 17th day of November, 1922, came the complainants by their solicitors and filed in the Clerk's office of said Court a certain Assignments of Error, in words and figures following, to wit:

179 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,
vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

Assignments of Error.

Now come the complainants, the Board of Trade of the City of Chicago, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord, and file the following assignments of error upon which they rely for grounds for reversal on the appeal in the above entitled cause:

1. That the District Court erred in dismissing said suit for want of equity.

2. That the District Court erred in not entering a decree pursuant to the prayer of said bill.

3. That the District Court erred in not granting a temporary injunction as prayed in said bill.

4. That the District Court erred in not adjudging and decreeing that said Grain Futures Act is void in toto because it violates the Constitution of the United States.

5. That the District Court erred in not adjudging and decreeing Section 4 of said Act, in so far as it seeks to restrict the use
180 of the mails, void because not within the power conferred on Congress to establish post office and post roads.

6. That the District Court erred in not adjudging and decreeing to be void Section 4 of said Act in so far as it seeks to prohibit the transmission by telegraph, telephone, wireless, or other means of communication any offer to make or execute or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, because not within the commerce power of Congress, and because it violates Section 2 of Article IV of the Constitution of the United States.

7. That the District Court erred in not adjudging to be void so much of Section 4 of said Act as prohibits, and by Section 9 of said Act punishes, the making of any contract for the future delivery of grain, except when made by or through a member of a board of trade which shall have been designated a "contract market," as provided in said Section, upon the ground that such provision as applied to future trading on the Board of Trade of the City of Chicago undertakes to regulate commerce which is wholly intrastate in character.

8. That the District Court erred in not adjudging to be void Section 5 of said Act upon the ground that the provisions of said Section are not within the commerce power of Congress.

9. That the District Court erred in not adjudging to be
181 void Section 6 of said Act upon the ground that the provisions of said Section are not within the commerce power of Congress.

10. That the District Court erred in not adjudging to be void sub-clause (b) of Section 6 in that it seeks to deprive members of said Board of Trade of their liberty without due process of law, by making the violation of any of the provisions of said Act, and any attempt to manipulate the market price of grain, crimes, and constituting the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, a Commission for the trial of such persons as shall be accused of such crimes, with power, as a punishment therefor, to deprive such offenders of their right to thereafter pursue a lawful vocation; whereas such criminal laws are, under the Constitution, enforceable only in courts created by law and presided over by judges holding office during good behavior.

11. That the District Court erred in not adjudging to be void sub-clause (b) of Section 6 of said Act as violative of Section 2 of Article III of the Constitution and the 6th Amendment thereto, in that it creates a crime and provides for a criminal prosecution therefor without according to the accused the right of trial by jury, and the right to be confronted with the witnesses against him.

12. That the District Court erred in not adjudging said Act violative of the 5th Amendment to the Constitution, and void, in that it seeks to compel members of said Board of Trade and their customers to furnish evidence which may be used in a criminal case against them.

13. That the District Court erred in not decreeing that so much of Sections 4, 5, 6 and 9 of said Act as make the records of transactions for the future delivery of grain kept by any person open to
182 the inspection of any representative of the United States Departments of Agriculture and Justice, void, because violative of the 4th and 5th Amendments to the Constitution in that it authorizes unreasonable searches respecting books and papers, which do not relate to any transaction within the commerce power of Congress, and authorizes the inspection of books and papers in order to secure evidence to be thereafter used in criminal proceedings under said Grain Futures Act against the owners of such books and papers.

14. That the District Court erred in not decreeing that sub-clause (c) of Section 5 of said Act, and the other provisions of said Act which provide for the enforcement of said sub-clause (c), to be void and in violation of the 5th Amendment to the Constitution in that such provisions deprive such Board of Trade and its members of their exclusive right to use their private property, and because said provisions will impair the value of such property and all memberships of said Board of Trade.

15. That the District Court erred in not adjudging said sub-clause (e) of Section 5 of said Act, and the other provisions enforcing said sub-clause (e), void, because in violation of the 5th Amendment to said Constitution in that it attempts, by forcing representatives of farmers' co-operative associations into membership of said Board of Trade, to take the private property of said Board of Trade and its members for public use without just compensation therefor.

16. That the District Court erred in not adjudging said Act void
183 in that it attempts to regulate commerce which is not interstate but purely intrastate in character.

17. That the District Court erred in not adjudging said Act void in that it is class legislation and deprives members of exchanges of the right to contract for the purchase of grain for future delivery as others may.

BOARD OF TRADE OF THE CITY OF
CHICAGO,

JOHN HILL, JR.,
REUBEN G. CHANDLER,
ADOLPH KEMPNER,
EMIL W. WAGNER,
ALFRED V. BOOTH,
EDWARD L. GLASER,
ALONZO B. LORD.

By ROBBINS, TOWNLEY & WILD,
Their Solicitors.

(Endorsed:) Filed Nov. 17, 1922. John H. R. Jamar, Clerk.

184 And afterwards on, to wit, the 17th day of November, 1922, this matter coming on to be heard, the following order was entered by the Court:

185 In the District Court of the United States, Northern District of Illinois, Eastern Division.

Friday, November 17, 1922.

Present: Honorable George A. Carpenter, District Judge.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

Order.

Now come the complainants, and it appearing to the court that a petition for appeal and assignments of error have been filed herein,

It is ordered that an appeal to the Supreme Court of the United States from the decree entered herein on the 17th day of November, 1922, be and the same is allowed, that for the purpose of enabling said court to decide said appeal a transcript of record herein be forthwith transmitted to said court, and that complainants file their appeal bond in the sum of five hundred (\$500) dollars, to be signed by said Board of Trade and a surety to be approved by this court, and that the temporary restraining order heretofore issued herein continue in force until the Supreme Court shall act upon the application of the complainants to that court for a further continuance of said order, provided, however, that such application shall be made not later than November 27, 1922.

CARPENTER,

Judge.

17 Nov., 1922.

186 And on, to wit, the 17th day of November, 1922, came Board of Trade of the City of Chicago, as principal, and C. H. Canby as surety, and filed in the office of the Clerk of said Court a certain Bond on Appeal in words and figures following, to wit:

187 Know all men by these presents: That we, the Board of Trade of the City of Chicago, as principal, and C. H. Canby, as surety, are held and firmly bound unto Charles F. Clyne, United States District Attorney for the Northern District of Illinois, Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United States Postmaster at the City of Chicago, in the full and just sum of Five Hundred (\$500) Dollars, to be paid to said Charles F. Clyne, United States District Attorney for the Northern

District of Illinois, Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United States Postmaster at the City of Chicago, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of November, A. D. 1922.

Whereas, lately, at the November term, A. D. 1922, of the District Court of the United States for the Northern District of Illinois, in a suit pending in said court between the Board of Trade of the City of Chicago, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord, as complainants, and said Charles F. Clyne, United States District Attorney for the Northern District of Illinois, Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United States Postmaster at the City of Chicago, as defendants, a decree was entered on the 17th day of November, 1922, dismissing said bill for want of equity, and said Board of Trade

188 of the City of Chicago, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord have obtained an order of appeal from said court to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Charles F. Clyne, United States District Attorney for the Northern District of Illinois, Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United States Postmaster at the City of Chicago, citing and admonishing them to appear in the Supreme Court of the United States within thirty days from the date of said citation. Now the condition of the above obligation is such that if the said Board of Trade of the City of Chicago, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser and Alonzo B. Lord shall duly prosecute their appeal with effect, and answer all damages and costs if they shall fail to make good their plea, then the above obligation to be void, else to remain in full force and effect.

[Corporate Seal.]

BOARD OF TRADE OF THE CITY OF
CHICAGO,

By ROBERT McDOUGAL,

[SEAL.]

Its President, and

JOHN R. MAUFF,

[SEAL.]

Its Secretary.

C. H. CANBY.

O. K.

CHAS. F. CLYNE,

U. S. Dist. Atty.,

By CHAS. L. SWANSON.

Approved:

CARPENTER, *Judge.*

17 Nov., 1922.

89 In the District Court of the United States, Northern District of Illinois, Eastern Division.

THE BOARD OF TRADE OF THE CITY OF CHICAGO et al., Complainants,

vs.

CHARLES F. CLYNE, United States District Attorney for the Northern District of Illinois, et al., Defendants.

To John H. R. Jamar, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

You will please prepare for the purpose of appeal a certified transcript of the following portions of the record in the above entitled cause, to wit:

1. Bill of Complaint.
2. All affidavits filed by complainant in support of said Bill.
3. Order to defendants to show cause why temporary injunction should not issue, and restraining defendants from enforcing Grain Futures Act.
4. Answer of defendants.
5. Decree.
6. Petition for allowance of appeal and continuance of restraining order.
7. Order allowing appeal and continuing temporary restraining order in force until application of appellants to the Supreme Court to continue the same has been acted upon by the Supreme Court.
- 190 8. Appeal bond.
9. Assignments of error.
10. Citation.
11. Amended præcipe for record.

ROBBINS, TOWNLEY & WILD.

Received a copy, November 18, 1922.

CHARLES F. CLYNE.

(Endorsed:) Filed Nov. 18, 1922. John H. K. Jamar, Clerk.

191 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the

above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with præcipe filed in this Court in the cause entitled Board of Trade of the City of Chicago, et al., vs. Charles F. Clyne, United States District Attorney for the Northern District of Illinois, et al., Number 3046, as the same appear from the original records and files thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 18th day of November, A. D. 1922.

[Seal of the U. S. District Court, Northern District of Illinois, 1855.]

JOHN H. R. JAMAR,

Clerk.

192 UNITED STATES OF AMERICA, ss:

The President of the United States to Charles F. Clyne, United States District Attorney for the Northern District of Illinois; Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United States Postmaster at the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein the Board of Trade of the City of Chicago, John Hill, Jr., Reuben G. Chandler, Adolph Kempner, Emil W. Wagner, Alfred V. Booth, Edward L. Glaser, and Alonzo B. Lord are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George A. Carpenter, Judge of the District Court of the United States, this 17th day of November, in the year of our Lord one thousand nine hundred and twenty-two.

GEORGE A. CARPENTER,

*United States District Judge for the
Northern District of Illinois.*

193

On this 18th day of November, in the year of our Lord one thousand nine hundred and twenty-two, personally appeared Kellam Foster before me, the subscriber, A. S. Papenguth, a Notary Public in and for the County of Cook and State of Illinois, and makes oath that he delivered a true copy of the within citation to Charles F. Clyne, United States District Attorney for the Northern District of Illinois, personally, and as Attorney of record for the Appellees, Charles F. Clyne, United States District Attorney for the Northern District of Illinois, Henry C. Wallace, Secretary of Agriculture of the United States, and Arthur C. Lueder, United

States Postmaster at the City of Chicago, at or about 4:00 P. M. on November 17, 1922.

Sworn to and subscribed the 18th day of November, A. D. 1922.

[Seal of A. S. Papenguth, Notary Public, Cook County,
Illinois.]

A. S. PAPENGUTH,
Notary Public.

[Endorsed:] No. —. Supreme Court of the United States.
Board of Trade of the City of Chicago, et al., Complainants, vs.
Charles F. Clyne, United States District Attorney for the Northern
District of Illinois, et al., Defendants. Citation to the Supreme
Court of the United States.

Endorsed on cover: File No. 29,251. Northern Illinois D. C.
U. S. Term No. 701. Board of Trade of the City of Chicago,
John Hill, Jr., Reuben G. Chandler, et al., appellants, vs. Charles F.
Clyne, United States district attorney for the northern district of
Illinois; Henry C. Wallace, Secretary of Agriculture, and Arthur C.
Lueder, United States postmaster at the city of Chicago. Filed
November 20th, 1922. File No. 29,251.

(7876)

Office Supreme Court, U. S.

FILED

NOV 27 1922

WM. R. STANSBURY

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1922.

No. 701.

THE BOARD OF TRADE OF THE CITY OF CHICAGO
ET AL., APPELLANTS.

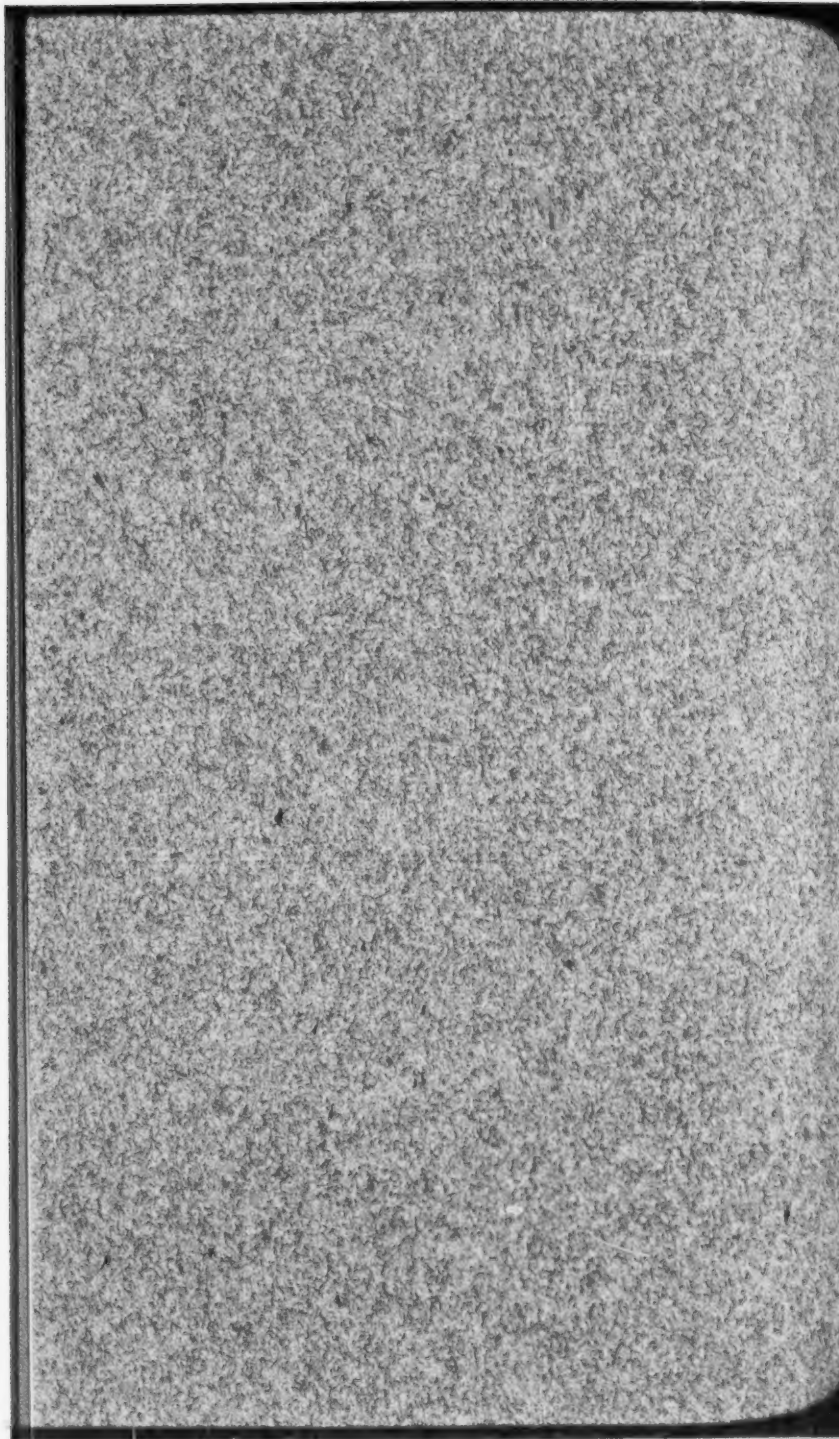
vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY,
ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE AND FOR AN ORDER PRE-
SERVING THE STATUS QUO, AND BRIEF IN SUP-
PORT THEREOF.

HENRY S. ROBBINS,
Counsel for Appellants.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1922.

No. 701.

THE BOARD OF TRADE OF THE CITY OF CHICAGO
ET AL., APPELLANTS,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY,
ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

NOTICE.

To the appellees in the above suit and their counsel:

Please take notice that on Monday, the 27th day of November, 1922, at 12 o'clock m., or as soon thereafter as counsel can be heard, we shall present to the court a motion to advance and for an order preserving the *status quo*, a copy

of which motion and brief in support thereof is hereto attached and served upon you.

HENRY S. ROBBINS,
Counsel for Appellants.

Received copy of above notice, motion, and brief this —
day of November, 1922.

Counsel for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

No. 701.

THE BOARD OF TRADE OF THE CITY OF CHICAGO ET AL.,
Appellants,

vs.

CHARLES F. CLYNE, *United States District Attorney*, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

**MOTION TO ADVANCE AND FOR AN ORDER PRE-
SERVING THE STATUS QUO.**

Now come the appellants in the above-entitled cause, by
Henry S. Robbins, their counsel, and move the court:

(1) To advance said cause and set the same down for an
early hearing, and

(2) For an order preserving the *status quo* while this
cause is pending in this court and for twenty days thereafter
by restraining and enjoining the appellee, Charles F. Clyne,
as United States District Attorney for the Northern District
of Illinois, from attempting to enforce the act of Congress
entitled the "Grain Futures Act" during the pendency of
this cause in this court and for twenty days thereafter, and
also from at any time prosecuting criminally, or otherwise,
under said act any member of the Board of Trade of the

city of Chicago, or any customer of any such member, for, or by reason of, any violation by him or them of any provision of said act committed during the pendency of this cause in this court or twenty days thereafter, and that appellee, Arthur C. Lueder, as postmaster of the city of Chicago, be also restrained and enjoined from interfering with any of the mail passing between members of said Board of Trade and customers of said members during the pendency of this cause in this court and twenty days thereafter.

The reasons for thus preserving the *status quo* are that said Grain Futures Act is unconstitutional and within the principle established by this court in its recent decision of the case of *Hill et al. vs. Wallace et al.*, and that if said *status quo* be not preserved by an order as above suggested said Board of Trade will be compelled either to refuse to qualify as a "contract market" under said act during the pendency here of said cause, in which event all future trading on its exchange would cease, and the grain markets of the country would be thrown into disorder and confusion, or said Board of Trade, to avoid such disturbance of its and other grain markets, must make voluntary application to become a contract market, and thereby abandon its right to have said act adjudged unconstitutional.

These reasons are amplified in the brief hereto attached.

BOARD OF TRADE OF THE CITY OF
CHICAGO ET AL.,

Appellants,

By HENRY S. ROBBINS,

Their Counsel.

**BRIEF FOR APPELLANTS IN SUPPORT OF THEIR
MOTION TO ADVANCE AND FOR AN ORDER
MAINTAINING THE STATUS QUO.**

This is an appeal from a decree dismissing for want of equity a bill filed by the Board of Trade of the city of Chicago and seven of its members against the United States District Attorney and Postmaster at Chicago and the Secretary of Agriculture, to enjoin enforcement of the recent act of Congress entitled the "Grain Futures Act."

Upon the filing of the bill the District Court entered a rule to show cause why a temporary injunction should not issue and, by an order substantially in the terms mentioned in the foregoing motion, restrained the defendants from enforcing the act pending the hearing of the motion for the interlocutory injunction. Upon such hearing the District Court denied the injunction and of its own motion dismissed the bill for want of equity, that an early decision on the question of the constitutionality of said act by this court might be had.

The sole purpose of the bill being to have said act adjudged to be violative of the Federal Constitution, the District Court allowed an appeal to this court and directed that its existing temporary restraining order continue in force until this court should act upon appellants' application for a continuance of such order, provided such application should be made by November 27, 1922.

Suits similar to the present one have been filed by the other principal grain exchanges where future trading occurs,

and by agreements of the parties to such suits, they are to abide the decision of this appeal.

The importance to the public (as well as to the grain exchanges) of an early decision as to the validity of this new act is so apparent that nothing need be said upon that part of this motion, which seeks to have the case advanced.

We confine ourselves to the reasons for preserving the *status quo*.

This "Grain Futures Act" was enacted to take the place of the "Future Trading Act" which, as respects all its regulatory features, this court, in *Hill v. Wallace*, annulled because beyond the taxing and commerce powers of Congress.

This former act placed grain exchanges, where trading in grain for future delivery occurred, under the control of the Secretary of Agriculture, who was to give them designation as "contract markets" if they complied, and continued to comply, with the regulations prescribed in the act. Compliance by the exchanges with the act was enforced by a tax of 20 cents a bushel upon all contracts for the future delivery of grain, which were not made "by or through 'a member of a contract market.'"

The new act re-enacts verbatim all the regulatory provisions of the former act. Instead of forcing the exchanges to become "contract markets" by a prohibitive tax on all future contracts not made by its members upon a qualifying exchange, the present act seeks to attain the same result by imposing a penalty and imprisonment upon any person, who makes a future contract for grain otherwise than when, or through, a member of an exchange which has become a contract market.

In other words the Grain Futures Act is the same as the Future Trading Act minus the tax imposed to enforce and

plus a provision making non-compliance by members of the exchanges a crime.

The new act attempts to support its validity by reciting that manipulation upon the exchanges causes sudden and violent fluctuations in prices, which in turn constitute a burden upon interstate commerce in grain; but the bill alleges this not to be so, and this allegation is supported in this record by a chart of wheat prices in Chicago for 81 years and by the affidavits of 22 of the leading professors of political economy in Harvard, Yale, and others of our leading universities.

It is, therefore, submitted that this Board of Trade ought not, while this appeal is pending here, to be forced to elect between causing the great disorder in the grain markets—which will result from the ceasing of future trading by its members—and voluntarily complying with the act and thereby prejudicing its right to a decision of this court upon its constitutionality.

No tax is here involved, as was the case in *Hill v. Wallace*, where a stay order was entered by this court.

True the stay there was specially worded, because the suit was by six members of the exchange, and thereby their individual rights were sufficiently protected. Here the exchange itself resists *all* the provisions of the act, and the stay order should be in the terms of the motion therefor. Otherwise traders may be confused, and desist from future trading, thereby curtailing the market resorted to—especially at this season of the year—for “hedging” by those who are now buying extensively the farmers’ grains.

That the public will not suffer by this short suspension of

the act follows from the fact that this exchange and its future trading have been going on for more than fifty years without congressional control, such as this act contemplates.

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Appellants.

(7819)

Office Supreme Court, U. S.

FILED

JAN 11 1923

WM. R. STANSBURY

CLERK

No. 701.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1922.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,

Appellants,

vs.

CHARLES F. CLYNE, United States District Attorney for the
Northern District of Illinois, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

HENRY S. ROBBINS,

Counsel for Appellants.

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IN THE
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1922.

No. 701.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Appellants,

vs.

CHARLES F. CLYNE, United States District Attorney for the
Northern District of Illinois, et al.,
Appellees.

Appeal from the District Court of the United States for the
Northern District of Illinois.

BRIEF FOR APPELLANTS.

STATEMENT.

The sole question on this appeal is the constitutionality of the Act of Congress entitled "The Grain Futures Act," recently enacted in lieu of "The Future Trading Act," which was in its principal features adjudged by this court to be unconstitutional in *Hill v. Wallace*.

A bill seeking to restrain enforcement of this later act (which is printed at the end of this brief) because unconstitutional was filed in the District Court by the Chicago Board of Trade and seven of its members (the latter suing on behalf of all members) against the United States District Attorney and Postmaster at Chicago, and

the Secretary of Agriculture. All the defendants answered denying some of the averments of the bill.

Upon the hearing of a motion for a temporary injunction the District Judge denied the injunction, and on his own motion dismissed the bill for want of equity. From that decree this appeal was perfected.

The title of the later act is, "An Act For the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes." The title of the former act was, "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade and for other purposes."

The former act contained certain provisions which attempted to bring under the control of the Secretary of Agriculture all grain exchanges, whereon occurred trading in grain for future delivery. These regulatory provisions were by this court in *Hill v. Wallace* held unconstitutional.

The present act re-enacts verbatim these regulatory provisions, which are sufficiently described in the opinion in *Hill v. Wallace*, as follows:

"Section 5 authorizes the Secretary of Agriculture to designate boards of trade as contract markets when and only when such boards comply with certain conditions and requirements, as follows:

(a) When located at a terminal market where cash grain is sold in sufficient amount and under such conditions as to reflect the value of the grain in its different grades, and where there is recognized official weighing and inspection service.

(b) When the governing body of the board adopts rules and enforces them, requiring its members to make and keep the memorandum of all transactions in grain, whether cash or for future delivery, as directed by the Secretary.

(c) When the governing body prevents the dissemination by the board or any member thereof of false, misleading, or inaccurate report, concerning crop or market information or conditions that affect or tend to affect the price of commodities.

(d) When the governing board provides for the prevention of manipulation of prices, or the cornering of any grain by the dealers or operators upon such board.

(e) When the governing body admits to membership on the board and all its privileges any authorized representative of any lawfully formed and conducted co-operative associations of producers having adequate financial responsibility:

'Provided, that no rule of the contract market against rebating commissions shall apply to the distribution of earnings among bona fide members of any such associations.'

(f) When the governing body of the board shall make effective the orders and decisions of the commission appointed under section 6.

Section 6 provides that any board of trade desiring to be designated as a contract market shall apply to the Secretary of Agriculture, with a showing that it complies with the conditions already stipulated in section 5 and a sufficient assurance of future compliance. The section appoints a commission of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, who may, after due notice to the officers of the board, suspend for six months or revoke the designation of any board as a contract market upon a showing of failure to comply with the requirements of section 5.

Provisions are made for an appeal from this order to the Circuit Court of Appeals, and appeal is granted to the commission from the refusal of the Secretary of Agriculture, upon application, to designate any board as a contract market.

Section 6 also provides that if the Secretary of Agriculture has reason to believe that any person is violating any provisions of the Act or is attempting to manipulate the market price of grain in violation of the provisions of section 5, or any of the rules or regulations made pursuant to its requirements, he may have served upon such persons a complaint for

a hearing before a referee, to take evidence, to be transmitted to the Secretary as chairman of the commission, and the commission may, after a finding of guilt, issue an order requiring all contract markets to refuse such person trade or privileges. This order may be revised in the Circuit Court of Appeals."

The enforcing provisions of the two acts differ. The earlier act imposed a prohibitive tax of twenty cents per bushel on every contract for the future delivery of grain, *except* (1) when made by the owner or grower of grain, or the owner or renter of land upon which it is grown, or associations of such persons, or (2) when such contract was made by or through a member of an exchange qualifying as a "contract market," and the failure of a seller to pay such tax was made punishable by a heavy fine or imprisonment.

The enforcing provisions of the later act contain the same exemption of owners or growers, etc., of grain, as did the earlier act. They also impose the same fine or imprisonment on any person, who delivers for transmission through the mails, or by interstate telegram or telephone, any offer to make, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale for future delivery on, or subject to the rules of, any board of trade. They also subject to like punishment any person making any such contract of sale, which is or *may be* used as a hedge, or for determining the price basis of any transaction in interstate commerce, or for delivery of grain in interstate commerce, *EXCEPT* when made by or through a member of a "contract market." While the wording here is more elaborate than in the former act, the two acts in effect are in this respect the same; as the later act so deters persons from resorting to the exchange as to make it impossible for the exchange without becoming a "contract market" to perform its important function of providing a market for future

trading. In short, both acts adopt the same method to compel the exchange to submit to federal control—by penalizing those who participate in its future trading, if the exchange does not thus submit. A minor difference is that the later act professes to be an exercise of the power of Congress over interstate communication.

Thus the difference between the two acts may be summarized by saying that the later act is the earlier act with the enforcing feature somewhat changed, and plus section 3, which reads as follows:

“Sec. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as ‘futures’ are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein.”

As section 3 is only argumentative in character and does not command anyone to do anything, it is apparent that each act has the same object—the regulation of the exchanges where future trading occurs—and as respects the question here for decision, *the directory provisions in the two acts are the same not only in substance, but in language.*

As the bill was dismissed for want of equity, its allegations present the facts, which are as follows:

The Chicago Board of Trade is a corporation created in 1859 by a special charter from the State of Illinois (Rec., 21), with power (1) to admit such persons as members, and expel such persons *as it shall see fit*; (2) to maintain such by-laws as it may think proper for the government of the corporation and for the management of the business of its members and the mode in which it shall be transacted; (3) to appoint committees of arbitration for the settlement of differences submitted by members or others,—the award in any such arbitration, when filed in the Circuit Court, becoming a judgment, upon which execution may issue; (4) to appoint persons to examine, measure, weigh, gauge, or inspect flour and grain—the certificate of such appointees as to the quantity or quality being made evidence between buyers and sellers assenting to their employment.

Its rules (Rec., 23) also vest the government of the Board in its board of directors, authorize such directors to determine what persons are of sufficiently good character and credit to be admitted to membership, and provide that each such applicant shall pay an initiation fee of \$25,000 or present an unimpaired membership to be transferred, and shall sign an agreement to abide by its rules and by-laws. These rules also provide for the suspension or expulsion of any member guilty of certain other offenses.

The Board itself transacts no business and pays no dividends. Its chief function is to provide an exchange room, where its members may meet daily between certain market hours and make with each other contracts for the purchase of grain and other products of the farm. It also prescribes rules respecting its members' contracts, and enforces them by disciplinary proceedings, when necessary; it also maintains and enforces rules for the settlement of any disputes arising out of members' contracts; and it displays in its exchange hall all available statistical and other news concerning crops, etc.; and about its only other function is to determine who are fit persons, as respects character and financial responsibility, to be and remain its members.

In recent years in most of the grain-producing states many so-called farmers' co-operative associations have been organized with the avowed purpose of enabling farmers, who become members, to market their crop at actual cost and without paying any commissions to members of the exchanges. Their plan is to have a salaried officer of the co-operative organization elected a member of the exchange, and through him to sell all the grain of the members of this organization—he temporarily charging the prescribed commissions and ultimately rebating back to such members the aggregate of such commissions (after paying his salary and incidental expenses) on the basis of the number of bushels of grain each farmer shall have sold through the organization—such rebates being commonly called “patronage dividends.”

In the past members of these co-operative associations have been refused admission to membership in this Board because their avowed purpose was to violate one of its rules prescribing the rates of commissions to be charged by members when acting as agents, and this would destroy the business of those of its members who receive

grain on consignment for sale; and the bill avers that the ultimate effect would be to much impair, if not destroy, the value of all memberships, and make it difficult for the Board to retain sufficient members to pay the assessments necessary to maintain the exchange.

Members of this Board engage only in the following kinds of trading in grain:

1. Some members receive from producers or country grain dealers grain to sell on commission and pay to their principals the proceeds less their commissions; and members also, either as agents or principals, buy and sell grain for immediate delivery in Chicago. Such transactions are known as "cash" transactions, and by the terms of The Grain Futures Act they are excluded from its provisions.

2. Some members of the Board send letters or telegrams at the end of each day to country points offering to purchase grain. When accepted these become contracts for the purchase of grain upon the condition that the grain is "to arrive" in Chicago within a certain time. (This kind of trading was involved in *Chicago Board of Trade v. United States*, 246 U. S. 231.) Other members in like manner make contracts for the sale of grain to be shipped from Chicago to milling or exporting points within a certain time. While, strictly speaking, all these are contracts for future delivery, they are expressly excluded from the provisions of The Grain Futures Act by being denominated therein as "cash sales for deferred shipment or delivery." Moreover, contracts of these two kinds are not strictly Exchange transactions, because the offers are generally sent from, and the acceptances are generally received at, the offices of the individual members. The contracts do not result from, or in, any trading on the Exchange itself.

3. Many members daily engage, either as principals or agents, in the making in the exchange room of contracts with other members for the purchase and sale of grain for delivery during a certain named future month. Such contracts relate almost wholly to wheat, corn and oats, and the volume of such trading is so large that the Board has set aside in its exchange room for such trading three separate spaces, commonly known as "pits," where many of its members daily gather and by open *viva voce* bidding make these contracts for future delivery. The rules of the Board require that all orders received by members to buy or sell for future delivery shall be executed in the open market in the exchange room during the prescribed market hours (9:30 a. m. to 1:15 p. m.) In all such contracts the buyers and sellers are personally present in Chicago, and any offer by a member becomes a contract with the member who first accepts the offer.

The bill sets out in detail the characteristics of such contracts. (Rec., 9.) The only grain that can be, or is contemplated to be, delivered on these contracts is grain that has already lost whatever interstate character it may have possessed.

Approximately six-sevenths of all the trading in grain for future delivery upon the exchanges in this country takes place on the Chicago Board of Trade.

The individual appellants in the present case brought a suit to have The Future Trading Act adjudged unconstitutional, because within neither the taxing, nor interstate commerce, power of Congress, their bill containing practically all the foregoing allegations of the present bill. The Solicitor General inserted in his brief in this court the speech in the Senate of the acting chairman of the Senate Committee on Agriculture, which stated the reasons of such committee why that bill should become The Future Trading Act. A reference to these reasons—

which are set out in the present bill (Rec., 15)—will show that they are practically the same reasons, which are recited in section 3 of the later act.

This court, in *Hill v. Wallace*, held the former act unconstitutional because not within the interstate commerce, or taxing, power of Congress, and on its mandate a final decree was entered in the District Court against appellee Clyne, et al., adjudging sections 4, 5, 6, 7, 8 and 10 of The Future Trading Act to be in violation of the Constitution, and permanently enjoining said Clyne from attempting to enforce the said act. The present bill claims that the defendants in the present suit are, by reason of said decree and the facts above stated, estopped to assert that such future trading is interstate commerce, or that Congress under its commerce power could lawfully enact sections 4, 5, 6, 7, 8 and 9 of The Grain Futures Act.

In denial of the recitals of section 3 of "The Grain Futures Act," the bill alleges that no corners have for the last fifteen years occurred in future trading in grain on the Chicago Board or the other exchanges, that such future trading has never been successfully resorted to for the purpose of manipulating or controlling, and thereby depressing, the prices of grain, that such selling for future delivery does not result in causing the prices of grain to be abnormally depressed; that neither such transactions for future delivery nor the prices therein are susceptible to manipulation or control, and that sudden or unreasonable fluctuations in the prices of grain do not frequently occur as the result of speculation or manipulation or control of prices, or transactions in said future trading; that such fluctuations as do occur in such prices are not detrimental to the producer or consumer, or the persons handling grain in interstate commerce; that on the contrary such future trading has materially

stabilized prices and caused fluctuations therein to become less sudden and less violent than they were before such trading became a practice on such exchanges; and that neither such future trading nor such fluctuations in prices of grain as do occur therein are an obstruction to, or burden upon, interstate commerce in grain. More than twenty affidavits of professors of Political Economy in our leading universities supporting these allegations were filed in support of the motion for an injunction. (Rec., 42-71.)

The bill recites the several grounds upon which The Grain Futures Act is claimed to be unconstitutional, and contains a prayer that it be so adjudged and that the present appellees be enjoined from enforcing it.

ERRORS RELIED UPON.

That the District Court erred:

1. In not holding that The Grain Futures Act and The Future Trading Act are essentially the same, and the decision of this court in *Hill v. Wallace* is controlling.

2. In not holding that The Grain Futures Act violates the Constitution of the United States in that thereby Congress attempts to regulate commerce which is wholly intrastate in character.

3. In not holding that The Grain Futures Act interferes with the legislative discretion of the states respecting their intrastate commerce, in violation of the Tenth Amendment of the Constitution.

4. In not holding that said Act is not within the power conferred on Congress to establish postoffices.

5. In not holding that Section 6 of the Act violates the due process of law provision of the Constitution in so far as it attempts to create a crime and to confer on

a commission composed of officials appointed by, and holding office at the will of, the President, judicial power to try and punish such crime, and that in so doing it fails to sufficiently define such crime.

6. In not holding the provision of the Act (Section 5 (e)), which requires the exchanges to admit to membership representatives of farmers' co-operative associations, and to permit "patronage dividends," violates the Federal Constitution in that it deprives the Exchange, as well as its individual members, of their property without due process of law.

7. In entering a decree dismissing the bill for want of equity, instead of granting a temporary injunction and proceeding to a hearing and decree adjudging said Grain Futures Act unconstitutional in the particulars above stated, and *in toto*.

POINT I.

THIS CASE SHOULD BE REVERSED WITH DIRECTIONS FOR A DECREE FOR APPELLANTS UPON THE AUTHORITY OF *Hill v. Wallace*.

Congress seems to have passed the present act under a misapprehension as to the scope of the decision in *Hill v. Wallace*. Immediately following that decision the Secretary of Agriculture caused to be drafted a new bill for this later act. In explaining the bill to the House Committee on Agriculture, the Assistant to the Secretary stated (See Hearings before the Committee on Agriculture, House of Representatives, Series CC, p. 2) that, as there was no language in the act showing the intention to exercise some other power, this court had annulled the former act "just because it was under the taxing power." And in the committee's favorable report it was stated that this court had held section 4 of the former act "to be

unconstitutional in that that law attempted to regulate the exchanges by the taxing system." (67th Congress, 2nd Session, House Report No. 1095.) The favorable report of the Senate Committee on Agriculture also stated that this court had annulled The Future Trading Act because it was "based solely upon the taxing power of the Constitution." (67th Congress 2nd Session Senate Report No. 871.)

Hill v. Wallace will not bear the construction thus placed upon it. The earlier act by its title was an act "for the regulation of boards of trade," as well as for taxing future contracts. Under a principle frequently announced by this court it was incumbent upon it to sustain the act, if this could be done upon any ground and this regardless of the title of the act. The exaction of the payment of 20 cents a bushel—though condemned as a tax—would have been upheld by this court as a penalty, if it had thought the act a valid exercise of the commerce power. The form of a penalty to enforce a law is exclusively within the legislative discretion.

In this view appellants' counsel in brief and argument attacked that law upon the ground that it was neither within the commerce, nor the taxing power, of Congress, and the opinion of this court squarely met this issue when, after deciding the act not to be within the taxing power, it said: "We come to the question then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the State." And thereafter, this court directed an injunction to prevent a compliance with identically the same provisions, which constitute the directory legislation of this later act.

While the opinion does contain language limiting the

decision so as not to debar Congress from enacting other proper legislation confined to interstate commerce, and designed to remove obstructions upon that commerce, it does not seem to warrant the assumption—which Congress seems to have indulged in—that the annulled law might be re-enacted, if Congress would incorporate in the new act its reasons for passing such a statute.

This is the more apparent from the fact that the new act (section 3) presents no reasons that were not before this court on the former hearing.

This court has held that, while the speeches of individual members of Congress may not be resorted to, the reports of the committees and the speeches of their chairmen, which explain bills and give the reasons for their passage, may properly be considered by this court. (*Duplex Co. v. Deering*, 254 U. S. 475.)

Under this rule the Solicitor General printed in his brief the speech of Senator Capper, the acting chairman of the Senate Committee on Agriculture, and father of both laws, giving the reasons of his committee for the passage of the earlier act. By reference to the extracts from that speech, which have been incorporated into the present record (p. 15) it will be seen that the committee recommended the passage of The Future Trading Act and its regulation of future trading on the grain exchanges "because of its arbitrary interference with economic laws and its disturbance of the balance that demand and supply of commodities when left to itself brings about," and because it "distorts true demand and supply and creates a false price;" and "violent and unnatural fluctuations;" and because "the evils in the marketing system which this bill undertakes to correct are:

- (a) Market manipulation by large operators. * * *
- (e) Arbitrary interference with the law of supply and demand." The senator also asserted that the speculators

“wrecked the true market, depressed the value of the producer’s property, and the big speculators and exporters bought wheat cheaper and cheaper;” and “that through manipulation of the market the big speculators on the Chicago Board of Trade are undoubtedly a powerful factor in fixing the price of the farmer’s wheat;” and the senator cited many statements by persons appearing before the committee, which were thought by the committee to sustain the foregoing charges.

The foregoing are substantially the same allegations as have been incorporated into section 3 of the present act with a view of having this court sustain the practical re-enactment of the old law.

How, then, is the case as now presented different from the case presented by *Hill v. Wallace*? The provisions of the law, which are material here, are the same. The reasons of Congress for their enactment are the same, and in both cases are brought to the attention of this court.

If there is a distinction broad enough to escape the effect of the former decision, it must lie in the fact that the reasons of Congress are now recited in the act, while in the former case this court had them from the records of Congress. Such a distinction must rest either on the ground that the recitals in a statute of the reasons of Congress for passing it become conclusive upon the court, when it is passing upon the constitutionality of the act, or that this court can fully appraise the reasons of Congress only when they are incorporated into the act.

The bill sets up the proceedings in *Hill v. Wallace*, including the decree entered on the mandate of this court and adjudging unconstitutional the same regulatory or directory provisions, which reappear in the later act; and as the former suit and present one are practically

between the same parties, these proceedings are pleaded as an estoppel against the assertion in this case of the validity of these provisions.

We do not stop to consider whether the technical doctrine of estoppel is here applicable; nor whether the doctrine of *stare decisis* is applicable to constitutional questions, because in any event *Hill v. Wallace* must, so far as applicable, control the decision of this case, unless this court shall conclude—what we may not assume—that it made a mistake in that case, and should now recede from that decision.

POINT II.

FUTURE TRADING ON THE EXCHANGES DOES NOT IMPOSE A BURDEN UPON INTERSTATE COMMERCE.

This proposition constitutes the key of the arch upon which this law rests. Without it the act clearly falls within the decision in *Hill v. Wallace*. Indeed the Secretary of Agriculture told the Senate that the declaration in section 3 that future trading is a burden upon interstate commerce “seems to be necessary to meet the requirements of that decision.” (67th Congress, 2nd Session, Senate Report, No. 871.)

The recitals of section 3 are not conclusive of this question. Doubtless recitals in an act of the reasons for its enactment are entitled to consideration, especially when they are in harmony with what is common knowledge, or what the court itself knows. (*Block v. Hirsh*, 256 U. S. 135, 150.)

But when the existence of constitutional power depends on a certain fact or condition, this court must for itself determine whether that fact or condition really exists; otherwise this court would yield to Congress its right and duty to decide upon the constitutionality of an act, and

a mere legislative fiat would be conclusive upon this court. As stated by the Court of Appeals, in passing on the constitutionality of a statute, in

Matter of Jacobs, 98 N. Y. 110:

“It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law.”

This is also true of a declaration in a condemnation statute that the contemplated use is a public one. (*Hirston v. Danville*, 208 U. S. 598, 606.)

Indeed, the same principle is recognized by this court in *Hill v. Wallace*, and in the *Child Labor case*, wherein recitals in the titles of those acts that the purpose was to tax were treated by this court as mere pretexts.

As stated by the late Chief Justice White, when as senator he was discussing the Hatch Anti-Option bill:

“My mind can draw no line of distinction between the false declaration of the exercise of the taxing power and the false declaration of impediment to commerce made for the purpose of vesting a jurisdiction in the Federal Government which it lawfully has not. * * * If this right by declaration obtains to bring every act under the interstate-commerce clause, all the inherent limitations in our Government will be destroyed and every vestige of local autonomy will be gone.” (24 Cong. Rec., 930.)

How then is the existence of this essential fact or condition to be ascertained—by the usual legal method of allegation and proof, or by such knowledge as this court is presumed to have?

If the former, then upon this record such obstacle or burden to interstate commerce does not exist; for the bill so alleges, and the case is here as upon a demurrer to

the bill sustained for want of equity; and the case should be reversed and remanded for proof on this question, if appellees, who in their answer have denied this averment, shall so desire.

But as after all this is a question of economic or trade law, which must be resolved more as a matter of expert opinion than by direct proof, it would seem to be a question, which this court could decide upon its own present knowledge of the subject, supplemented by such resort to the writings of trained minds as it shall find necessary.

In that view we have gathered in an Appendix to this brief (separately printed for convenience) extracts from the report of the United States Industrial Commission, from the records of the English Parliament, and from leading writers on Political Economy, in the belief that this would furnish this court more ready access to the literature on that subject.

This record also contains (pp. 42, 44) two price-charts, prepared by Dr. Boyle, Professor of Political Economy in Cornell University, showing prices of cash wheat at Chicago over a long period of time, and the affidavits of twenty-two professors of Political Economy in our leading universities expressing their views upon the recitals in section 3, which would also seem to provide—as would the writings of such persons—a proper source of information for this court.

Starting then with the proposition that the price-fluctuations under consideration are such as are created in sales for future delivery on an exchange, which “are not in and of themselves interstate commerce,” such prejudicial effect, if any, as these fluctuations may have upon this future trading—which is purely intrastate commerce—or those participating in it must be put to one side.

Our inquiry is to be confined to the effect of these future

price-fluctuations on such cash sales—including sales “of cash grain for deferred shipment or delivery”—*as are interstate commerce.*

We should here start with a clear conception that the prices in these *future* sales do not *fix or determine* the prices in *cash* sales in either intrastate or interstate commerce. The cash price and the future price in the same market will never—or at least only by a rare chance—be the same, except in the delivery month of the future contract when further trading for delivery in that month usually ceases except for the closing of existing contracts.

The cost of carrying the grain from the present time to the future delivery date constitutes one normal element of difference between the “cash” price and the price in the futures. So when the future sales contemplate delivery in a month of the next crop year the cash and future prices have no fixed relation to each other because dependent upon different supply conditions.

True, the cash prices will not continue below the level determined by a deduction from the future price equal to the normal cost of carrying the actual grain until the delivery month; for whenever cash wheat thus falls speculators quickly take advantage of it by buying the cash and selling the future.

But the cash price may be, and frequently is, relatively higher than the future price because of some urgent immediate demand of millers or exporters or other reason. (See p. 87 of this brief.)

So too, there is nothing to *compel* those, who make interstate sales or purchases of grain, to accept as their price the future price or any fixed departure from it. Two persons engage in a cash transaction in grain only when both minds agree upon what the price should be,

and this occurs only when each is satisfied to join in a trade at that price. It is, in other words, a price voluntarily arrived at. What is true of an individual sale is equally true of all the sales which go to make up interstate commerce.

Doubtless the quotations of prices in future trading constitute a part, and often an important part, of the *information upon which the minds of seller and buyer act* in agreeing upon their price. That these quotations of future prices do not correctly and precisely speak the prices in the future trading no one contends. But the shipper of grain across state lines will be more influenced by the prices of "cash" grain in his accessible markets, which are seldom actually, and often not relatively, the same as the future prices.

Thus the position of Congress must be, that the future prices in purely *intrastate* commerce may, and as respects grain at times do, so directly, materially and prejudicially affect cash prices in *interstate* commerce as to become, within the meaning of the Constitution, an obstacle thereto, and burden thereon, which Congress may remove. More upon this later. We are here concerned only in developing the scope of the question.

We must first ascertain the test or standard by which to determine, whether these price fluctuations in intrastate commerce are a burden upon interstate commerce. Nothing may be regarded as a burden upon commerce, which does not prejudicially affect those engaged in it or the public generally. If this country exported *all* the grains that it raises, it might be said that whatever tends to raise the price is beneficial rather than hurtful, and only such conduct or influences as tended to depress prices should be regarded as a burden upon commerce. But this country consumes the major part of its own grains, and this court has determined in *U. S. v. Patten*, 226 U. S.

525, that a conspiracy of persons to run a "corner" and thereby *increase* prices is so harmful to the public as to be within the Sherman Anti-Trust Act.

Hence, *what the law contemplates is the free and unrestricted play of the natural law of supply and demand.* Only such conduct or influences, therefore, as cause prices in interstate commerce to be other than such as would result from this natural law, are to be here considered in ascertaining what are burdens upon that commerce.

This burden may arise either because such prices are raised above, or depressed below, the normal price. The former could result—if at all—only from the excessive buying of speculators who aim to "corner" the markets and thereby force short sellers to settle at a price above the natural price. But "corners" in the grain market are "a thing of the past." (Appendix, p. 33.) The amount of capital and credit required, the probability of failure and consequent enormous losses, rules of the Exchange prohibiting and penalizing "corners," and the decision of this court in *U. S. v. Patten*, 226 U. S. 525, have caused "corners" to be found only in past history.

The bill avers (Rec., 13) that no "corners" have for the last fifteen years occurred in the future trading in grain on any of these exchanges. The truth of this averment, as respects Chicago, will be apparent from an inspection of the two price-charts (pp. 42, 44) in this record, and the deductions therefrom, stated on page 85 of this brief. A "corner" will be indicated on these charts by an abnormal rise of price in the latter part of a month followed by an abrupt decline on the first day of the succeeding month. These charts disclose no such condition during recent years. Indeed, Senator Capper, in explaining to the Senate the earlier of these bills, said (61 Cong. Rec., p. 5227) :

"In 1911 the Chicago Board of Trade put in a rule that has practically stopped manipulation of prices upward, sometimes called 'corners.' * * * Manipulation downward only hurts the producer, the grower of the grain. The boards of trade could prevent such manipulation, as 10 years ago they prevented manipulation upward."

Furthermore, "corners" were mainly a *struggle between speculators*, which prejudicially affected no one else. The producers were not hurt, because they were enabled to sell their grain on a higher market, and on the buying side of the market the effect was largely local. As stated by Professor Emery (Appendix, p. 32) an early "corner" in the Chicago market did not materially affect the price in New York.

The question here is thus reduced to, whether the fluctuations in this future trading are such as to abnormally *depress* the price of "cash" grain in interstate commerce to the prejudice of the producers.

Before coming directly to this question it will be helpful to look into history to see how the legislative mind of the past has at different times viewed speculative trading especially in grain.

About 400 B. C., in Athens, grain dealers were executed for buying more than fifty measures of corn and selling it at a profit. (See Oration of Lysias, the Attic orator, Appendix p. 48.) In 1698 time dealings in grain were forbidden in Antwerp.

In England "regrating"—buying of corn, etc., in any market and selling it again in the same market—was by statute (5 and 6 Edw. VI, c. 14) made a crime, as was also "engrossing"—the buying up of large quantities of corn, etc., with intent to sell again—and forestalling, whatever made the market dearer to the trader. This statute was repealed by 12 Geo. III. c. 71, and 7 and 8 Vict. c.

24. In 1733 a statute was passed in England (Sir John Barnard's Act) "to prevent the infamous practice of stock jobbing," which prohibited all sales of stock by parties not owning the same. This act was repealed in 1860.

In 1864 Congress passed the Anti-Gold Act, which forbade all contracts for the sale of gold which was not actually in the possession of the seller at the time of contract. This act was repealed two weeks after its passage.

A statute of New York, passed in 1812, declared void all contracts for the sale of stocks unless the seller at the time actually owned, or was authorized by the owner to sell, the same. This was repealed in 1858. In Pennsylvania a statute penalizing short-selling was passed in 1841 and repealed in 1862. In 1867 Illinois made it a misdemeanor for anyone to contract for the future delivery of grain unless he then owned and had possession of the grain (Illinois Laws, 1867, p. 181). The next legislature repealed this act.

Following the development of the system of grading grain and issuing warehouse receipts therefor there came into existence organized speculation in grain, which has been concentrated in the grain exchanges. Few things have been more misunderstood and more blamed.

Early in 1892, the House Committee on Agriculture reported favorably a bill (23 Cong. Rec., 2910 & 5071), one of whose objects was stated to be "to restore to the law of supply and demand that free action which has been destroyed by the practice of short-selling." The bill imposed a tax of twenty cents a bushel on all grain sold for future delivery, which the seller did not then have or have growing. The bill passed the House by a vote of

167 to 46. It also passed the Senate, with some minor amendments, on January 31, 1893, by a majority of 21, but too near the end of the short session to become a law. *Thus both houses of that Congress committed themselves to the proposition that all future trading in grain was prejudicial to commerce.*

In April, 1892, the United States Senate directed one of its committees to investigate the causes of the depression in agriculture and the remedies therefor. This committee recommended legislation which would result in the "suppression of the business commonly known as dealing in futures and options," and "restore silver coin to its ancient place as money." (53d Congress, 3d Session, Sen. Rep., 787.)

On May 8, 1894, the Committee on Agriculture of the House of Representatives filed a report (53d Congress, 2d Session, H. Rep., No. 845) recommending the passage of the second Hatch Anti-Option Bill—which imposed a prohibitive tax on sales of grain for future delivery *not followed by actual delivery*—and stating that the purpose of the bill was "to restore to the law of supply and demand that free action which has been destroyed by the practice of short selling." The bill passed the House by a vote of 150 to 89, but by this time the Senate had grown wiser and the bill was not put to a vote. Nothing more contributed to the final defeat of this attempted legislation than the arguments of the distinguished senator (afterwards Chief Justice), who said:

"The system of future dealing, as found in this country today * * * is a part of the common acquisition of the *human mind for the last two hundred years or more.* * * * There is no political economical writer in any language recognized as authority, unless he be tinctured either with socialism or communism, who does not approve of these contracts and state that they are necessary for the

development of commercial affairs and that they operate wisely and beneficially upon both the producer and the consumer." (24 Cong. Rec., 931.)

On June 18, 1898, Congress created a non-partisan commission known as "The Industrial Commission," composed of five senators, five congressmen and nine other representatives of different industries, and required the commission, among other things, to investigate questions pertaining to agriculture and *to suggest such legislation as it might deem best*. Authority was conferred to compel the attendance of witnesses and to administer oaths. It made a partial report in January, 1901, and a final report on February 10, 1902. As a rule it examined only disinterested persons including experts who had given the subject exhaustive study. A perusal of the extracts from these two reports printed in the Appendix to this brief (pp. 2-14) will be found instructive here. Suffice it here to say that the commission found that future trading was helpful to the grain trade and did not depress prices. *The committee did not recommend the prohibition of, or any restrictions upon, future trading.*

In 1896 Germany passed a law prohibiting future trading in grain, which for a time suppressed all such future trading on the Berlin Bourse. The prejudicial consequences of this are pointed out by the writings of the German economist, Dr. Georg Wermert. (Appendix to this brief, pp. 16-18.) Subsequently future trading was renewed on the Bourse under some modified regulations approved by the Government.

While the agitation for this law was under way in Germany, the English Royal Commission on Agriculture entered upon an investigation of future trading in grain; but it was the unanimous opinion of the best experts that the prices in the speculative markets followed, and did

not lead, the prices dictated by the law of supply and demand and efforts at legislation were defeated. (See Appendix, p. 15.)

Indeed, some of our federal judges fell into the error of thinking that future trading on the Chicago Board of Trade was due to gambling and that for this reason the law should deny to the Board protection of the resulting quotations; but this court, in *Board of Trade v. Christie* (198 U. S. 236), rejected this view and brought the public mind to a right conception of the economic value of this future trading.

But the most recent practical demonstration of the value of future trading is that furnished by the present Secretary of Agriculture, when—this court having so phrased the stay order first entered in *Hill v. Wallace* as to stop all future trading on the grain exchanges—he at once moved this court to modify the order in order that great damage might not be done to the grain trade by the enforced cessation of future trading.

The bill avers (Rec., 14) and the evidence in the *Christie case* showed—that the grain buyers' profit in moving the grain from the farmers to the foreign market—which formerly was from five to eight cents a bushel—had been reduced to not exceeding two cents a bushel by the opportunity afforded by future trading to the grain dealers to insure themselves against price fluctuations by the making of "hedging" contracts.

Thus it will be seen that theories respecting speculative trading in grain, which had in the past been deemed by legislators to be economic truths and been made the basis of restrictive legislation, are now conceded to be economic fallacies. No thoughtful person now contends that on economic grounds public injury results from speculation in grain, or that all future trading on the grain exchanges should be suppressed.

It is one thing for the legislative power to mistake a false economic theory for the truth. Laws based upon it may be—as they often have been—easily abandoned or repealed. *It is a different, and far more serious, thing for this court to make an economic fallacy the basis for a far-reaching construction of the Constitution, which should, and generally does, endure.*

All that the proponents of this legislation now claim is that “sudden or unreasonable fluctuations in prices” in future trading “frequently occur as the result of speculation, manipulation or control,” and that a depression of prices which results therefrom is “detrimental to the producers or consumers,” and hence is a burden upon interstate commerce. This claim is expressed by the acting chairman of the committee (Senator Capper), in recommending the passage of the former bill, as follows:

“The plain truth, Mr. President, is that through manipulation of the market the big speculators on the Chicago Board of Trade are undoubtedly a powerful factor in fixing the price of the farmer’s wheat. They sell large volumes of wheat futures short during a period before harvest when there is no great volume of buying, and the weight of their selling forces the price down. Then, by continually hammering, they hold the price there until the crop movement begins, when hedging sales place sufficient pressure upon the market to enable the speculators to buy back what they sold without advancing the price.”

The short-seller’s only motive is to profit by correctly forecasting the price, at which grain will sell at a future day. He is ever conscious that there are others at hand, who are actuated by a like motive to profit by buying, when the market price is such as to promise profit.

Before one can sell he must find some other member of the exchange who, or whose customer, takes a directly

opposite view of the probable future price; the quantity bought equals the quantity sold. It is these conflicting views of many traders, which make the market. Thus future-trading but expresses the attempts of all participants therein to profit by correctly forecasting the future price. Each is acting under the highest incentive to be right, because of the severe loss that will result from being wrong. They all know that the ultimate factor is the law of supply and demand, as affected by the market conditions when the delivery time arrives. Their sole aim is to correctly appraise the effect of such conditions upon the operation of that law.

Thus future trading expresses the prevailing sentiment as to what the prices will be in the future month, just as the cash trading expresses the prevailing sentiment as to what the present proper price is.

To suggest that among short-sellers any other motive is a dominant one, either in the individual trader or in a group of traders, is to overlook the fact that he or they do not, like the "long" buyers, get an advantage from a limited storage capacity or a temporary and limited local supply. They are bidding against a world of buyers who can margin their trades as long as the sellers do. The seller always faces the necessity of either acquiring the actual grain to deliver or of buying back his contract in a market, where many others there are only too eager to take advantage of his mistaken judgment or misdirected effort.

But to be more specific,—the above charge of Senator Capper is disproved in the report of the U. S. Industrial Commission, which says (Appendix, pp. 6-12):

"The question to be answered in this discussion is: 'Does speculation tend to lower prices?' If so, are the fluctuations of such a character as to injure the interests of the farmer as against those of the dealer or speculator? * * * That speculation

tends to lower prices permanently even the most outspoken opponents of the system of dealing in futures have not undertaken to charge. * * * Even if we were to admit that the speculative purchases and sales for future delivery could affect current spot prices, the opposite effects of the transactions of the bull and the bear would balance each other. * * *

Our analysis thus shows that as far as there is a speculative influence in depressing prices, it is not exercised by the much abused short, but by his opponent, the bull. * * * Spot prices may and may not move in sympathy with the future prices, according to conditions of actual demand and supply. * * *

This explains why spot prices are sometimes above future prices for the same month, although, as a rule, the latter are higher than the former by the amount equal to the cost of storage of the grain in the warehouse. * * *

The professional speculator is in the market not for the purpose of either depressing or raising prices. * * *

This leads to the conclusion that so far from being the cause of low prices short selling is rather a consequence, in the sense that it is indulged in only when it is thought that the natural tendency of the market is such as to favor a trend of low prices. * * *

That is, under speculation, while fluctuations of prices are more frequent, they do not reach so wide extremes as they used to. * * *

As we have attempted to show, it is a mistake to represent speculation in futures as an organized attempt to suppress prices to producers. * * *

Because evidence believed to be conclusive has been presented showing that, under speculation, prices prevailing at the time when producers dispose of the greater part of their products are greater in comparison to the rest of the year than they were before the advent of modern speculation. * * *

The purpose is to show that such differences in time prices are not caused by speculation, but can be adequately accounted for by the natural condition of supply and demand."

Professor Weld, of Yale University, obtained the average monthly prices of cash wheat in Chicago for the ten-year period, 1901 to 1910, and says (Appendix, pp. 39-40):

“The difference between the average September price and the average May price is only 2.9 cents—hardly enough to pay for carrying wheat in an elevator for nine months. * * * In other words, the farmer year in and year out obtains as much and more for his wheat by marketing in the fall as by holding until the following spring. * * * Speculation not only tends to level prices throughout the year, but it performs a most signal service in making price changes over short periods less abrupt. * * * In this connection, the fallacy that short selling has the effect of generally depressing prices should be mentioned, * * * Suffice it to say that the pressure from the bull side is just as great as from the bear side (in fact there are likely to be more bulls than bears if anything), and that the bears tend to defeat their own purpose by having to become buyers, as explained above. Objections to speculation based on this time-worn argument appear to be decreasing.”

As the result of an investigation of the English Royal Commission on Agriculture, the Earl of Dudley, on behalf of the Government, stated in the House of Lords (Appendix, p. 16):

“That the unanimous opinion of the best experts is that the price in those [speculative] markets follows and does not lead the price dictated by the laws of supply and demand. In fact, they are of opinion that this system of dealing in ‘futures’ instead of deteriorating prices, rather tends to equalise them and to counteract the fluctuations that always must exist.”

Professor Paul LeRoy-Beaulieu, a noted French professor of Political Economy in the College of France, says (Appendix, p. 15):

“The claim is often made in the United States and in Germany that future trading should be prohibited because it causes low prices of commodities. * * * There is little foundation for this reasoning, for future trading, so far as prices are concerned, tends as much to raise prices as to lower prices—much

more often indeed to do the former. * * * Speculation, after full account is taken of its evils and its benefits, of its advantages and its disadvantages, is one of the forces indispensable to human progress."

Dr. Georg Wermert (Appendix, p. 17), in discussing the prohibition of future trading in the German Act of 1896, points out that "prior to this time the wheat price had been lower in Vienna than in Berlin. But since the prohibition of future trading the price level in Berlin has fallen below that in Vienna."

Professor Emery in an article on the German law (Appendix, pp. 18 & 19), says:

"It must be admitted that the German law has proved a double failure. * * * Certainly no reasonable argument can be made for the claim that speculation reduces prices to the producer. On the contrary, the exact opposite is the case since it reduces greatly the margin between the farm price and the price of the central market."

Dr. Otto Johlinger, writer (Appendix, p. 20) says:

"Thanks to speculation, the time-differences in price and the place-differences in price are leveled down. As a consequence the fluctuations in price are much smaller than formerly. * * * Indeed, they show that it was future trading that finally put the grain trade on a safe basis and removed from it its former speculative character."

Professor John George Smith, of England, says (Appendix, pp. 22-27):

"The bear speculator is one of the strongest factors in steadying price movements, and in obviating extreme fluctuations. It is not that short sellers actually determine prices. All they do is simply, by the act of selling, to express their judgment as to what prices will be in the future. * * * Short-selling, therefore, does not unduly depress prices as is often asserted; but it is, instead, a very powerful agent in steadying them. * * * From the constant contests of short-sellers with the bulls a much truer level of

prices is evolved than could otherwise ensue. * * * One of the chief services rendered by expert speculation is the lessening of fluctuations, and the establishment of prices which correspond to the actual conditions of supply and demand all the world over. * * * That speculative sellers do not control the market is further borne out by the fact that prices of wheat and cotton rise and fall quite independently of the amount of dealings in futures. * * * But statistics given in the British Association report [1900] do not lend support to the view that the growth of futures markets in wheat has resulted in a remuneration to the farmer less in proportion than formerly. * * *

Professor Emery, of Yale, says (Appendix, pp. 29-33)

"In the first place, it is desirable to dispose of the more or less prevalent idea that speculative prices are determined 'regardless of the law of demand and supply.' Such an idea is based on a complete misapprehension of the nature of value. The more free the competition between buyers and sellers, the more minutely is price regulated by demand and supply, and nowhere is competition more free than on the exchange.

Prices on the exchanges, however, are (and must be) determined by the existing demand and supply. * * * The familiar argument is, that short selling is a selling of products that do not exist, in addition to those that do, and so furnishes a corresponding increase of supply, which necessarily depresses prices; and then figures representing enormous sales are brought forward as statistical proof. These sales, however, are also purchases, and the question of their amount is of no importance. * * * A comparison of the degree of depression with the amount of future sales shows that increased speculation has always accompanied higher prices. * * * What then is the effect of speculation on prices? Primarily, as has been shown, it acts to concentrate in a single market all the factors influencing prices. In this way a single price is fixed for the whole world. * * * Perhaps the most potent influence in preventing wide fluctuations is the much maligned short seller. * * * There are always some shorts ready.

to buy in as prices first fall, and some bulls ready to sell out as prices first rise, and these forces are very effective in graduating prices. So perfectly does the system work that a sudden change in price, of any importance, is very rare. * * * The tendency of speculation is to lessen marked fluctuations and to establish prices which correspond to actual conditions of demand and supply in all places."

Professor Boyle, of Cornell University (Appendix, pp. 33-35)—

"Applying this test of supply and demand to the [Chicago] Board of Trade wheat prices for the ten normal years, 1905-1914, we find that the daily prices do fluctuate in accordance with supply and demand factors. * * * It may now be stated at this point, that future price does not determine cash price. The conclusion seems warranted that neither future nor cash price has a dominating influence, permanently, over the other, but that both are merely effects of supply and demand causes. They are, in short, effects of the same underlying causes. * * * It seems fair to conclude, therefore, that speculation in grain on the organized exchanges lessens price fluctuations. * * * Speculation does not fix prices, but registers prices. * * * There is little room for doubt that should the organized grain exchanges be abolished (and particularly future trading) the grain trade would very rapidly be centralized in the hand of a few powerful houses. * * * But the speculators in the future market, numbered by the tens of thousands, * * * are too widely scattered and too independent to be controlled—so long as the market remains free and open to them.

Professor Ely, of the University of Wisconsin (Appendix, pp. 36-37)—

"We are not here concerned with the general evils of speculation but with the prevalent belief that speculative dealing in futures tends to reduce prices. * * * This particular charge against speculation is confirmed neither by *a priori* reasoning nor by inductive analysis. * * * The average prices of spot wheat in September, October and November—

just after harvest, when the ordinary farmer is compelled to sell—have been nearer the average price for the entire year, since the speculative wheat market has become highly organized, than in the forties and fifties when wheat was sold like any other farm product. And there are reasons for the belief that speculation has not only equalized yearly fluctuations, but that the leveling has been up, not down, in the interest of the farmer who is compelled to sell after harvest, as opposed to the wealthier miller or trader who in the past carried over a supply for the lean months.”

Professor Seligman, of Columbia University (Appendix, pp. 43-44)—

“The chief economic function of regular speculation consists in the assumption of risk and results in the equalization of price. * * * The result of regular speculation, again, is to steady prices. * * * Speculation thus tends to equalize demand and supply, and by concentrating in the present the influences of the future it intensifies the normal factors and minimizes the market fluctuation.* * *”

Professor Ivey, of the University of Nebraska (Appendix, pp. 44-45)—

“Strange to say, speculation has been accused of causing wide price fluctuations, and hence has been thought to depress business. The truth is that under normal conditions speculation stabilizes price, while lack of speculation permits an erratic market. * * * Speculation thus produces market equilibrium. * * * During a period of 100 years, before future trading was inaugurated, price fluctuations were twice as great as during the period since that date.”

Professor Grover G. Huebner, of the University of Pennsylvania (Appendix, pp. 45-47)—

“Cotton and grain growers not infrequently contend that it depresses the prices which they receive. * * * The sale of futures, whether as a short sale or otherwise, does not, however, have such a depressing effect. * * * ‘This popular misconception of short selling overlooks the

extremely important fact that influential speculators seldom undertake deliberately to contest natural conditions at least for any length of time. * * *

* * * Statistics as well as common trade knowledge indicate that in the years when the volume of future sales is greatest spot prices are usually higher than when speculation is at low ebb."

Professor Hibbard, of the University of Wisconsin (Appendix, p. 47)—

"It has been shown repeatedly that fluctuations in prices before the development of organized speculation were not only as violent as, but usually more violent than, they have been since that development.

* * * In the case of the wheat market, the records show fluctuations to have been greater before the time of exchanges than since. * * *"

The views of these writers are confirmed by the two price charts of Chicago cash wheat prices (the one covering a period of 81 years) contained in this record (pp. 42, 44.)

The claim asserted in section 3 of The Grain Futures Act—that sudden or unreasonable fluctuations in prices frequently occur as the result of speculation, manipulation or control, in future trading, and constitute a burden upon interstate commerce—is also *expressly negated* by the affidavits of twenty or more professors of political economy in our leading universities, which form part of this record (pp. 40-71.)

Thus this concurrence of view in the minds of those, who are best qualified to know, clearly establishes (1) that future trading has not produced sudden or unreasonable fluctuations in prices; (2) that such fluctuations do not frequently occur as the result of speculation, manipulation or control, and (3) that such fluctuations as do occur in future trading are not detrimental to the producers or consumers, or a burden upon interstate commerce.

Furthermore, there was nothing in the hearings before the committees of Congress preceding the passage of this and the former act to justify these recitals in section 3 of the act. These committees did have "hearings," at which the proponents and opponents, without being sworn, were heard, and all they said has been printed as public documents under the heading of "Hearings before the Committee on Agriculture." Professor Seligman, of Columbia University, before making his affidavit in this record, read over these documents, and found nothing in them to sustain these recitals of section 3. And any one perusing them will reach the same result.

The next question is—what are the limitations of the commerce power of Congress? In an early case (*Passenger Cases*, 7 How. 402) this court said:

"A State cannot regulate foreign commerce, but it may do many things which more or less affect it."

Again, this court, in passing upon certain rules of a live stock exchange, regulating agents' commissions, said in

Hopkins v. U. S., 171 U. S. 578, 591-594:

"Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, * * * they are not charges which * * * are charges upon commerce itself. * * * There must be some direct and immediate effect upon interstate commerce in order to come within the act. * * * The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. The effect upon the commerce spoken of must be direct and proximate. * * *

An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and

yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."

Again, this court in adjudging unconstitutional an act of Congress prohibiting a carrier engaged in interstate commerce from discharging an employe simply because of his membership in a labor organization, said in

Adair v. U. S., 208 U. S. 161, 178:

"Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

Again in

Hooper v. California, 155 U. S. 648, 655, this court held that "The contract of insurance is * * * a mere incident of commercial intercourse," and not a part of interstate commerce.

Among numerous other decisions by this court illustrating this principle are the following:

Smith v. Maryland, 18 How. 71;

Blumenstock v. Curtis Publishing Co., 252 U. S. 436;

Brodnax v. Mo., 219 U. S. 285;

Merchants Exchange v. Mo., 248 U. S. 365;

Field v. Barber Co., 194 U. S. 618.

Under these authorities whatever is intrastate in character must, in order to be a burden upon interstate commerce, (1) directly touch or affect such commerce, and (2) affect it in a substantially injurious way. In other words, it must be a direct and onerous burden upon such commerce.

Does then this intrastate future trading thus burden interstate commerce? *Considered in its entirety*, no one

claims that it does. All concede that future trading is distinctly helpful to commerce.

All that is claimed by the proponents of this legislation is, that the *prices* made in this future trading at times prejudicially depress prices in interstate transactions in grain. It has already been shown that this is a false premise.

But assuming it to be a true one, can it be said that such intrastate prices so directly and materially affect interstate prices as to constitute a burden on interstate commerce? As we have already seen, interstate traders in grain are not obliged to accept, nor do in fact accept, these intrastate prices as the prices in their interstate transactions. They constitute but a part of the information upon which such traders act in agreeing upon their prices. If Congress may justify interference with this purely intrastate trading upon the theory of protecting the normal play of the law of supply and demand as respects grain, it may upon the same grounds regulate the numerous exchanges, where stocks, eggs, butter and other produce are dealt in, and whose prices are quoted in the daily press. Thus is presented the question, whether purely intrastate trading becomes subject to the commerce power of Congress *merely because it frequently indirectly affects prices in interstate commerce*. But there can be no distinction between intrastate prices and anything else of an intrastate character, which affects interstate prices. In other words, the question here is, whether every intrastate employment, business, or condition is within the commerce power of Congress, if it in any way affects prices in interstate commerce.

If so, then this court was wrong in adjudging unconstitutional the first Child Labor Law; because the employment of child labor in the manufactures of one state would certainly have a tendency to demoralize interstate

prices for the same articles, which are manufactured in an adjoining state which prohibits child labor. Indeed, this court seems to have met this view, when it refused to uphold the child labor law on the ground of unfair competition.

Again, if the protection of prices in interstate commerce is to be held to justify the exercise of the interstate commerce power, that power will be enlarged far beyond any present conceptions of it. Wages of labor employed in manufacture and other elements of manufacture materially affect the prices of such manufactured products as subsequently enter into interstate commerce. Is the commerce power broad enough to regulate labor employed in, and other features of, manufacture? This court in *United States v. Knight & Co.*, 156 U. S. 1, 17, stated that combinations which raise or lower prices or wages in domestic enterprise only indirectly affect interstate commerce. See also

Railroad Co. v. Richmond, 19 Wall. 584.

We do not here contend that Congress may not treat as an obstruction to commerce persons, who combine for the purpose of *directly* fixing or affecting prices in *interstate* commerce (as in the *Addyston Pipe case*, 175 U. S. 211; the *Swift case*, 196 U. S. 375, and the *Patten case*, 226 U. S. 525), but only that acts which may directly influence prices in *intrastate* trading in grain for future delivery can only *indirectly* affect, if at all, the *interstate* buying and selling of grain for *immediate delivery*; and that such acts are, therefore, beyond the commerce power of Congress.

We therefore submit that the fluctuations in the prices in this future trading do not, within the contemplation of law, constitute a burden upon interstate commerce because

(1) They but express the operation of the law of supply and demand and ~~were not~~ the result of manipulation or control, and

(2) If they did result from improper manipulation or control, they would not so directly and materially affect interstate trading as to constitute a burden thereon.

POINT III.

THE PRESENT ACT IS NOT ONE TO REMOVE AN ALLEGED BURDEN UPON INTERSTATE COMMERCE.

The extent of this commerce power of Congress varies with the condition or subject matter, with respect to which it is called into play. The question is one of repugnancy. Does the act or condition sanctioned or permitted by the state conflict with what is properly within the sphere of federal power? The laws of Congress are only paramount so far as Congress has power to go—that is so far as the nature of the federal power extends. Congress may adopt all appropriate means, which are conducive or adapted to the end to be accomplished. But whether the means adopted in the particular case are of this character, or are but a pretext to accomplish something beyond the power of Congress, is finally a question for this court. The extent of the grant of power must necessarily be judged by, and limited to, its object. Here the power is only one to remove burdens upon interstate commerce; and the question is, whether The Grain Futures Act can be considered as only a means to that end.

If the condition or subject matter is wholly of an interstate character, the extent to which the power may be exercised, rests exclusively within the discretion of Congress.

But if the condition or subject matter be partly of an interstate and partly of an intrastate character—that is, if the two are intermingled, as in the case of railroads and telegraph companies doing both an interstate and intrastate business—this commerce power will be judicially confined to that which is interstate; and a regulating act of Congress which is not thus confined will be adjudged invalid.

Trade-Mark Cases, 100 U. S. 82.

This limitation is recognized in the acts creating the Interstate Commerce Commission and the Federal Trade Commission, which confine such commissions to the regulation of interstate activities.

The only qualification to this principle is found where there is an intermingling of interstate and intrastate elements—as in the case of railroads—and that which is interstate cannot be protected or regulated without also touching that which is intrastate—as, for instance, where interstate rates cannot be adequately maintained without also regulating such intrastate rates as affect the interstate rates.

Minnesota Rate Cases, 230 U. S. 354;

Houston Ry. Co. v. United States, 234 U. S. 342.

This is upon the theory that the state rates are a discrimination, as against the interstate rates, and hence are a burden upon interstate commerce; but here the federal power is limited to the removal of the obstruction.

Illinois Cent. R. R. v. Public Utilities Com.,
245 U. S. 493.

Even here Congress may not use this qualification of the general principle as a pretext for regulating intrastate commerce, which is not thus directly related to that which is interstate.

Still another phase of the question is presented where the condition or subject matter is wholly within intrastate commerce, but it gives rise to certain incidents or opportunities, which enable evilly disposed persons to so act as to create an obstacle to or burden upon interstate commerce. The commerce power here should—if the spirit of the Constitution is not to be violated—be confined to measures directly aimed *at the obstacle and those who create it*. Congress may not use such obstacle as a pretext or excuse for absorbing complete control of such intrastate commerce in respect to things and persons in no way responsible for the supposed obstacle or burden. The present case falls within this last phase of the question.

Again, when one is guilty of criminally wronging either individuals or society at large, the law provides two, and only two, remedies. The state or nation may stop it by a resort to its civil courts, where an injunction is an effective remedy; or it may enact a criminal statute and therein prescribe—and enforce—such penalty or punishment as will deter such wrongdoing. Congress may not compel a trade agency created by a state and not itself participating in the offense—as a condition of its continuing to participate in purely intrastate commerce—to actively assist the nation in the enforcement of its laws—that is, become the police officer or the criminal court of the General Government.

The obstacle here claimed is overtrading which prejudices prices in interstate commerce in grain. The grain exchanges never trade at all: they merely maintain halls where others trade. The great majority of the members of exchanges are not guilty of overtrading. As the bill avers (Rec., 9, 12), approximately six-sevenths of all future trading upon the exchanges takes place on the Chicago Board of Trade. Of its 1,600 membership,

many are bankers, officials of railroad and steamship companies, packers, etc., who are not active members of the Exchange. Many more act only as agents in receiving consignments of grain, or in the making of contracts for future delivery. None of these trade at all for future delivery.

Of the members and non-members, who, by buying or selling grain for future delivery, seek to profit by the rise or fall in prices, most of them trade only in too small quantities to affect prices; and of the small number of persons, who have sufficient capital to, and do, trade extensively, many are not members of the Exchange; and few, if any, are able to manipulate or control prices. If Congress may regulate future trading on the exchanges, because a few individuals abuse the privilege of trading there, it may also regulate hotels because some persons abuse the privilege of being guests in a way to violate the Mann Act.

The Grain Futures Act does not in the section (9), which provides for the enforcement of the act through the criminal courts, include as an offense manipulation or overtrading. The act, however, does in fact, in section 6, make an attempt to manipulate a crime. When this is ascertained by the commission which the act creates, the offending person is punished by being deprived of the right to trade on any exchange—which may be his only vocation—and the exchange is required to cooperate in imposing this punishment, as a condition to the exercise of its right to conduct its purely intrastate business. Thus the exchange—which is not guilty of manipulation or overtrading—is punished by this law by being restricted in its right to pursue a lawful business. In other words, the exchange is compelled by Congress, in the exercise of its commerce power, to do police duty in the enforcement of a federal act as a condition to

its transacting business that is purely intrastate.

The act is, therefore, not one to remove an obstruction to commerce, because it does not adopt the only appropriate means for doing so—a statute aimed at those who create the obstacle. See in this connection, *U. S. v. Dewitt*, 9 Wall. 41, where this court held that Congress could not prohibit the making of some oils in order to increase the production of others that it taxed.

POINT IV.

THE REMOVAL OF AN OBSTRUCTION TO INTERSTATE COMMERCE IS A MERE PRETEXT, UNDER WHICH CONGRESS SEEKS TO REGULATE WHAT IS EXCLUSIVELY INTRASTATE COMMERCE.

The Future Trading Act was an attempt to regulate the exchanges under the pretense of raising revenue. The present act aims to do the same thing under the guise of an act to remove a burden upon interstate commerce.

This is apparent from the following facts:

(1) The act asserts that these price fluctuations obstruct interstate commerce in grain, when, as we have shown, there is no basis in fact for such a claim.

(2) Its remedy is not adapted to the disease. It is not confined to the removal of what is claimed to be an obstruction, nor to those who may create it. It is not such as would be resorted to, if the removal of the alleged burden were the only purpose of the act.

(3) The provision of the act (section 5 (e)) which forces into membership representatives of farmers' organizations, and exempts them from compliance with the commission rule, *has no relation whatever* to the removal of the burden to commerce alleged to result from over-

trading. No one will claim that the admission to membership of a few farmers will affect in the slightest the volume of future trading.

Add to the above that this act re-enacts *verbatim* the regulatory features of The Future Trading Act—which in its title professed to be “for the Regulation of Boards of Trade”—and it ought to be obvious that the present act, under the pretense of removing an alleged burden to interstate commerce, is in reality but a second attempt to subject the grain exchanges—as respects their purely intrastate commerce—to bureaucratic control by the Secretary of Agriculture.

What this court said in *Hill v. Wallace* of The Future Trading Act is equally true of this later act, that “It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney-General.”

POINT V.

THE GRAIN FUTURES ACT CONFLICTS WITH THE LEGISLATIVE DISCRETION OF THE STATES RESPECTING THEIR INTRASTATE COMMERCE, AND IS IN ITSELF A BURDEN UPON THAT COMMERCE.

The Chicago Board of Trade is typical of all the grain exchanges. It neither buys nor sells. It is not an organization for profit. It is merely an instrumentality of trade created by the state, by means of which its members join in maintaining an exchange hall, where they may meet and trade as individuals, and by means of which they may determine, who are fit persons to share in these

trading privileges, and they promulgate rules to promote their business relations and to fix the terms of, and to enforce, the contracts which they make with one another.

Practically all who personally make trades in the exchange room are residents within the state of Illinois. All the trading for future delivery—which constitutes much the larger part of the trading in the exchange room—is intrastate commerce (*Hill v. Wallace*); the selling on commission by members in the exchange room of grain consigned to them by the owners is, as respects the service they render, intrastate commerce (*Hopkins v. United States*, 171 U. S. 587); the buying of grain by members on the commission basis is of the same character. Much of the buying and selling for immediate delivery upon the Exchange is necessarily between persons, who reside in Illinois, and relate to grain, which has never been out of Illinois; while most of the buying and selling of grain by members of the Exchange for deferred shipments to or from Chicago is not made in the exchange room, but by letters or telegrams between the offices of such individual members and the other parties to such purchases or sales. In other words, the business attributable to the existence of the Exchange is preponderatingly of a domestic, as distinguished from an interstate, character.

Future trading on the Exchange, which takes place in the “pits” is distinctly separable from the “cash” trading, which takes place around the sample tables in the exchange room; and this future trading is wholly intrastate commerce.

Because of this local character of exchanges and of the business conducted in their exchange halls it has become settled that the general regulation of the grain ex-

changes and their activities belongs to the states and not to the federal government.

Hill v. Wallace;

Brodnax v. Missouri, 219 U. S. 285;

Merchants Exchange v. Missouri, 248 U. S. 365;

Ware & Leland v. Mobile County, 209 U. S. 405.

This state power is consistent with the federal power to prevent anything arising out of this intrastate commerce from becoming a burden upon interstate commerce, as was claimed to be the case in *U. S. v. Patten*, 226 U. S. 525, and *Board of Trade v. U. S.*, 246 U. S. 231.

As said in *Hammer v. Dagenhart*, 247 U. S. 275: (*italics ours.*)

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

* * * The power of the States to regulate their purely internal affairs *by such laws as seem wise to the local authority* is inherent and has never been surrendered to the general government."

This court also said in *McCulloch v. Maryland*, 4 Wheat. 316, 421:

"The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

And that spirit of fairness, which should prevail as to all questions arising between the individual states and the nation, requires that a similar latitude in the exercise of discretion should be accorded to the state legislatures when acting within their proper field.

When called upon to legislate respecting grain ex-

changes and future trading thereon, the Illinois legislature had the choice of three alternatives:

First: It might have wholly prohibited all future trading either on moral or economic grounds, if this would not conflict with the right to contract guaranteed by the state and federal constitutions.

Second: It might adopt what may be appropriately called the *laissez-faire* method—that is, it might by its charter leave to the members of the exchange, which it was creating, the adoption and enforcement of such rules, as they thought best suited to produce a free, broad and efficient grain market. This in the belief that such members were more directly interested in attracting the grain trade to their market, and were by their training and business experience best equipped to restrain any overtrading—the state itself refraining from any attempted regulation of, or interference with, price-making, and contenting itself with such statutes as would prevent incidental abuses, such as the running of “corners,” trading in “puts” and “calls,” and improper trading for future delivery by individuals, where the mutual intent to deliver was not present.

Third: The legislature might have adopted a method—which may be called the *bureaucratic method*—such as Congress has prescribed in The Grain Futures Act.

This method rests upon the theory that the members of an exchange are either too selfish or too ignorant to appreciate that their interest is to maintain, in competition with the other grain exchanges, the most efficient market possible. It rests on the theory that the natural law of supply and demand unaided does not, and cannot, always operate in the grain markets.

This method suggests, except in one respect, the thermostat, which in our homes and offices turns off the heat

when it is too warm and turns it on again when it is too cold. Thus this method is to furnish—at the meager salary which our governments pay those who serve them—a deputy of a high official, who is possessed of all the wisdom necessary to keep the markets at the proper price level. To enable him to do this he is to know by access to the brokers' books what the total volume of open contracts is, and how much each broker (and each customer of each broker) has open on the market.

The total volume of sales will not enlighten him, because he will find the same number of bushels bought. The existing volume of trading will not aid him, because this has no relation to prices, which at times go up or down on light trading and at other times do the same on brisk trading.

What, then, is to determine for him whether the price at any given time has been deflected from the normal by overtrading? Nothing but his own wisdom.

If in his superior wisdom—supplemented by that his chief, immersed in other important duties, is able to contribute—this deputy finds that the future market has too much steam on, that is, that prices are going up too far, he will cut off that steam by telling certain brokers and their customers to curtail their purchases; and they will be quick to obey, because otherwise the high official may have them thereafter denied access to all future markets. If this deputy finds that the market is going lower than he thinks it ought to, he will turn on more steam by requiring brokers and their customers to curtail their short-selling. Thus he is to become the embodiment of, or a substitute for, the natural law of supply and demand.

The difference between this method and the thermostat is that, while the latter is controlled by natural law, this trade thermostat is to run upon the superior wisdom of a

single human mind. Instead of natural prices there is to be substituted man-made prices.

It is unfortunately true that to err is human, and this wise man may sometimes err; or he may be naturally more sympathetic toward the farmers' side of the market than toward the consumers' side, in which case he will with the best of intentions warn off the sellers that the buyers may the better put the market up. Or this deputy might himself trade and thus become interested in the course of prices.

But what is sure to happen under this method is that many buyers and sellers will not speculate in a market where the prices are to be man-made or man-controlled; and thus the future market will cease to be the broad one that it should be to properly function.

The present able Secretary of Agriculture may be able to prevent the tendency above indicated, but he will not always continue in office; and one has to reflect that Secretaries of Agriculture have been heretofore, and doubtless will be hereafter, selected from environments which are liable to create a desire to help the farmers, even at the expense of the consumers. Certainly the Illinois legislature might well have despaired of being able to secure at all times the services of a deputy of the requisite wisdom to administer efficiently this bureaucratic method for the control of its great grain market.

Of the three methods above mentioned, the state of Illinois—in the exercise of that legislative discretion, which it may claim as its right—has adopted, and steadily adhered to, the second or *laissez-faire* method. For the legislative mind often finds expression in silence. This is as true as respects state legislatures as this court has declared it to be as respects Congress. In other words,

Illinois has adopted the view so well expressed by this court in *Board of Trade v. Christie*, 198 U. S. 236, 247-8, "that the natural evolutions of a complex society are to be touched only with a very cautious hand."

In the exercise of its legislative discretion this state has also conferred on this Board of Trade the right to say what persons are fit to become and remain its members, instead of reserving to itself control over memberships.

Nor is it surprising that Illinois has adopted, and adhered to, this policy; for thereby it has secured for its principal city the "greatest grain market in the world," and the efforts and wisdom of its grain dealers have also produced the most economical and efficient method of marketing the crops that the world has ever known.

What, then, does Congress by this Grain Futures Act propose? It does not claim that future trading, as sanctioned by the state of Illinois, is not, when considered in its entirety, a great benefit both to the producers and the consumers, or that it is a burden upon interstate commerce. All that it does claim is that one of the elements or incidents of this trading, *considered by itself*, is prejudicial to commerce and should be regulated by applying to all future trading the human element in the shape of a more strict governmental control. But this is nothing more than that Congress says to the Illinois legislature: "You have not exercised your legislative discretion as wisely as we think you should, and therefore Congress will exercise it for you."

Hence this Grain Futures Act is invalid as impairing that legislative discretion which the tenth amendment reserves to each state when legislating respecting its internal commerce.

In this view The Grain Futures Act instead of being

one to remove a burden upon interstate commerce is one which imposes a burden upon intrastate commerce by impairing the right of the state to regulate it.

POINT VI.

THE ACT CANNOT BE SUSTAINED UNDER THE POWER OF CONGRESS TO ESTABLISH POSTOFFICES, OR UNDER ITS CONTROL OF INTERSTATE COMMUNICATION BY TELEGRAPH OR TELEPHONE.

The act imposes a heavy fine upon any person, who shall transmit through the mails or by interstate telegram or telephone "any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States," except where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market."

The purpose here is not to exclude from such avenues of communication a message or letter or quotation that is false or obscene or fraudulent in itself or will promote fraud or other illegal conduct. The prohibition is not based upon the nature of these communications. Their character will not be changed by the mere designation of the exchange as a contract market.

Its only purpose is to compel the exchange to accept designation as a contract market by denying its members—if the exchange refuses to so qualify—the privilege of communicating with their customers through the mails or by interstate telegram or telephone. The prohibition is in the nature of a penalty. It is one of the enforcing provisions of the act.

THE POSTAL POWER.

The Constitution confers on Congress power "to establish postoffices and post roads." Under this power this court has upheld acts of Congress excluding from the mails, lottery tickets and circulars, and other matter deemed injurious to the public morals.

Ex parte Jackson, 96 U. S. 727;

In re Rapier, 143 U. S. 110;

Public Clearing House v. Coyne, 194 U. S. 497;

Leach v. Carlile, 258 U. S. 138;

Lewis Publishing Co. v. Morgan, 229 U. S. 288.

In all these cases the exclusion has been based upon the actual character of the matter excluded or upon facts having an obvious and logical relation to a purpose and intent of parties to misuse the mails.

In these cases this court has said that this power is not absolute. Thus in *Ex parte Jackson*, *supra*, this court said that regulations must be enforced "consistently with rights reserved to the people, of far greater importance than the transportation of the mail." And that, "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution."

In *In re Rapier*, *supra*, the court said: "We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question."

In *Lewis Publishing Co. v. Morgan*, *supra*, this court said that "The exertion of the power of course, at all times and under all conditions being subject to the express or necessarily implied limitations of the Constitu-

tion. * * * We do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails."

In *Burton v. U. S.*, 202 U. S. 344, 371, this court said that a statute providing for the exclusion from the mails of fraudulent matter must be "consistent with the rights of the people as reserved by the Constitution."

In *Hoover v. McChesney*, 81 Fed. 472, it is held that the right to the use of the mails as well as the use of the transportation lines is a property right, which could not be taken away except by due process of law.

INTERSTATE COMMUNICATION BY TELEGRAPH OR TELEPHONE.

There rests upon all transporting instrumentalities, whether state or interstate, and whether they carry—as early stagecoaches did and modern railroads now do—tangible property, or as telegraph companies they transmit messages, or as telephone companies they merely carry the sound of the human voice, the duty to serve all without discrimination. This duty, as applied to the instrumentalities then existing, was a part of the common law at the time the Constitution was adopted.

Out of this duty arises the correlative right of everyone to be served as all others are. This right also existed when the Constitution was adopted; and it could not have been its intention to impair this common right to service, when it conferred upon Congress, as a part of its commerce power, the right to regulate all interstate transporting instrumentalities.

Hence comes the principle that, while Congress may prevent such service from being misused for immoral purposes, or to further lotteries or other evil designs, it

may not exclude persons from sharing in the service in order to force an assent to the exercise of a power not possessed. "A constitutional power cannot be used by way of condition to attain an unconstitutional result." (*Western Union v. Foster*, 247 U. S. 114.)

It follows, therefore, that *any* attempt to thus exclude presents the same question, whether made through a regulation of a railroad, a telegraph, or a telephone company.

As respects a railroad, this question is no longer an open one in this court; for, while it has sustained a statute preventing interstate carriers from transporting lottery tickets (*Lottery Case*, 188 U. S. 321), and the Pure Food and Drug Act preventing the shipments of adulterated articles (*Hipolite Egg Co. v. U. S.*, 220 U. S. 45), and the White Slave Act prohibiting the transportation of women for immoral purposes (*Hoke v. U. S.*, 227 U. S. 308); this court has also in

Hammer v. Dagenhart, 247 U. S. 251,

annulled an act of Congress which penalized any manufacturer for delivering "for shipment in interstate or foreign commerce * * * the product * * * of any * * * factory * * *" employing child labor, this court saying:

"The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. * * * The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture. * * * In our view the necessary effect of this act is, by means of a prohibition against

the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

The above principle should be regarded as equally clear as respects telegraph and telephone companies. Indeed, this act also impairs the "freedom of speech" guaranteed by the Constitution, which includes what is spoken (over the telephone) and what is written.

Indeed, Congress may no more obstruct intrastate commerce (except where necessary to the proper regulation of interstate commerce) than the state may obstruct interstate commerce; and a Federal statute, like the present one, which prohibits one from transmitting by telegraph or telephone an order to his agent in another state to make there for him an intrastate contract, does obstruct and burden intrastate commerce in a way not permissible within the spirit of the constitution.

Again, the principles above stated apply also to the mail service. If this were provided by private enterprise, as Herbert Spencer advised, the applicability of this duty to the mail would be self-evident. As the Government has retained the monopoly of the mail service, and as it is a service that all must have, it could not have been the intention of the Constitution that the ser-

vice should be free from the duty to serve all alike, or that it might be used to indefinitely enlarge the other limited powers of Congress.

If the right to thus discriminate in the rendering of this service of interstate communication were sustained, it would bring within the regulatory power of Congress every business or enterprise of a purely intrastate character; for they all must use the mails and the facilities for interstate telephone and telegraph communications. Thus the tenth amendment to the Constitution would become a practical nullity.

POINT VII.

THE INSURANCE FEATURE.

Section 3 of the act recites that future contracts are utilized by shippers and dealers engaged in interstate commerce "as a means of hedging themselves against possible loss through fluctuations in price."

Section 4 of the act makes it unlawful for any person to make a contract of sale upon an exchange "which is or may be used for hedging any transactions in interstate commerce in grain," except it be made through a member of a "contract market."

These provisions seem to be based upon the theory that, because those who ship grain in interstate commerce resort to future trading *to get insurance*, future trading is thereby subject to the interstate commerce power.

But this court has held that the business of insurance is not commerce, nor an instrumentality of commerce, but a mere incident thereto.

Paul v. Virginia, 8 Wall. 168;

Hooper v. California, 155 U. S. 648;

New York Life Ins. Co. v. Cravens, 178 U. S. 389.

Surely the mere form or method, in which such insur-

ance is furnished can make no difference in the principle; and the foregoing provisions furnish no constitutional basis for the act.

POINT VIII.

OTHER MINOR FEATURES OF THE LAW.

Section 3 recites that future trading is "affected with a national public interest." It hardly seems necessary to say that Congress may not by such a declaration enlarge its interstate commerce power.

Section 4 makes unlawful any future contract—not made through a "contract market"—"which is, or may be, used for * * * determining the price basis of any such transaction in interstate commerce in grain." As already pointed out (p. 19) the prices in future trading do not determine, in the sense of fixing, the prices in interstate trading, but at best are only a part of the information, which the interstate traders consider in fixing their own prices. This clause therefore seems meaningless.

Section 4 also makes unlawful any contract—not made upon an exchange that has become a "contract market"—which *is or may be used* for delivering grain sold, shipped or received in interstate commerce for the fulfillment thereof. It has already been pointed out (p. 9) that the only grain deliverable upon future contracts is grain represented by warehouse receipts issued by the public grain-mixing warehouses of Illinois covering grain that has entirely lost any interstate character it may have had. The thought behind this provision seems to be that, if any *ingredient* in a commodity possessed an interstate character, the commodity continues to be one in interstate commerce. This repudiates the original package doctrine, and would make many kinds of manufacture inter-

state commerce, because some of their raw materials originally were of that character. This clause, therefore, has no proper relation to future trading, which the act seeks to regulate.

POINT IX.

THE PROVISION OF THE ACT (SEC. 5 (e)) REQUIRING EXCHANGES TO ADMIT TO MEMBERSHIP REPRESENTATIVES OF CO-OPERATIVE ASSOCIATIONS OF PRODUCERS, AND SANCTIONING "PATRONAGE DIVIDENDS" DEPRIVES THE BOARD OF TRADE AND ITS MEMBERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

This identical provision was in The Future Trading Act, and was by this court held to be not within the commerce power of Congress. That decision would seem to require this court to hold the provision, when repeated in the new act, also invalid; for this provision—as shown on page 44 hereof—has no tendency whatever to remove or minimize the fluctuations in prices in future trading, which are claimed to be a burden upon interstate commerce. In other words, the reasons alleged for re-enacting some of the provisions of the former act, and which are thought to justify the new act, have no application to this particular provision.

But this provision is also unconstitutional upon the further ground that it violates the due-process provision of the Constitution.

All private property is held subject to the proper exercise of the power to impress property with a public use, and any statute, which is the exercise of this power, does not violate the Constitution by depriving the owner of his property without due process of law.

Munn v. Illinois, 94 U. S. 113.

The question here is whether section 5 (e) of The Grain Futures Act can be sustained as a proper exercise of this power. This calls for a consideration of the origin and scope of this power.

The early common law divided business occupations and the properties used therein into two classes. One included those which were strictly private. In these the common law permitted the owners to sell, or refuse to sell, their property and their services in connection therewith as they pleased, and to charge therefor any price they saw fit. They could serve, or allow the use of their property to, one person, and refuse a like privilege to another for no reason whatsoever.

The other class comprised those occupations, in which owners had so used their property that the public acquired an interest therein to such an extent that such owners were not permitted either to discriminate between those desiring to share in the service rendered, or to make an unreasonable charge for such service. The common law placed on such owners the duty to serve all alike and at reasonable rates.

In this class were the local miller, the inn-keeper, the carrier (in that age a stage-owner), the owner of a wharf on a navigable water (wharfinger), etc.

As travel and transportation developed, it gave rise to railroads and other modern common carriers; but these were obliged to seek and obtain from the state special privileges, such as the right of eminent domain, and thereby they submitted themselves to a larger measure of governmental control than exists as respects the class now under consideration. Having once devoted their property to use as a railroad, these are not permitted to withdraw it from that public use. But even as respects this class the power to legislate has been confined to statutes which benefit the public at large.

See *Mo. Pac. Ry. v. Nebraska*, 164 U. S. 403.

It has never been held, even as respects these modern common carriers, that any person could be legislated into a position where he might share with the owners the profits accruing from the use of their property in public service.

Returning now to the second of the classes above named—as business life became more complex and the instrumentalities used therein became more enlarged and complicated, it became necessary that there should rest somewhere the power to impress other properties and their owners with a public use and thereby impose on them this duty of serving all alike and at reasonable rates.

The courts of the country are now agreed that this power is legislative and not judicial in character.

Express Cases, 117 U. S. 29;

American Live Stock Co. v. Live Stock Exchange, 143 Ill. 210;

Ladd v. S. C. P. & M. Co., 53 Texas 172.

Apparently the first of these statutes passed the Illinois Legislature in 1871. It undertook to fix the maximum rates of storage for the grain-mixing elevators of Chicago. That statute was attacked in this court—

Munn v. Illinois, 94 U. S. 113,

upon the ground that it violated the due-process-of-law clause in the fourteenth amendment of the Constitution, but this court upheld the statute as a proper exercise of the power to impress property with public use, or to regulate property, whose use by the owner had already impressed it with a public use.

Similar statutes were subsequently passed in New York and North Dakota, and these were sustained by this court on the same principle.

Budd v. New York, 143 U. S. 517;

Brass v. North Dakota, 153 U. S. 391.

Subsequently this court sustained as a proper exercise of this power a Kansas statute—which required insurance companies to charge reasonable rates—and amplified the doctrine by making the business, rather than the property used therein, the object to be impressed with a public use.

German Ins. Co. v. Kansas, 233 U. S. 389.

All these statutes were alike in that the benefits they conferred accrued to the public generally and not to a mere class of the public. None of them required the owners of the property or business to do more than permit all to share in the service rendered without discrimination and at reasonable rates. The foregoing is also true of the state statutes involved in the numerous state decisions reviewed by this court in *Budd v. New York*, *supra*.

Neither the inn-keeper, stage-owner, wharfinger, etc., under the common law, nor the grain elevator owner or insurance company under these statutes, was required to admit others to share in the ownership of the business or the instrumentality rendering the service or in the profit accruing to the owners therefrom. Thus in

Munn v. Illinois, 94 U. S. 133,

this court said:

“There is no attempt to compel these owners to grant to the public an interest in their property, but to declare their obligations, if they use it in this particular manner.”

The foregoing decisions of this court also make it clear that the power to impress property with a public use is, as respects a state, “an exercise of the police power of the state.” (*Budd v. New York*, 143 U. S. 545). And in

Lawton v. Steele, 152 U. S. 133-137,

when discussing the nature and extent of the police power,

as exercised by a state statute providing for the destruction of fishing nets, this court said:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference."

It thus appears clear that in a proper case a state, in the exercise of its police power, may by statute impress some kinds of property and business with a public use.

But the general police power resides only with the states. Congress may exercise such power only so far as it is included in the other powers conferred on it by the Constitution.

Hamilton v. Kentucky Distilleries, 251 U. S. 146;

United States v. Cruikshank, 92 U. S. 542;

Tennessee v. Davis, 100 U. S. 257, 302.

If Congress has also this power to impress property with a public use, it must reside in its commerce power.

Again, this power as respects any particular object must reside exclusively either in the state or in Congress; it cannot well reside in both without producing conflicting statutes.

Where the property is wholly within a state and the business, in which it is used, is mainly intrastate, the power to impress them with the public use ought, it would seem, to belong exclusively to the state, especially where, as here, Congress has no power to regulate generally.

The property of this Board is situated in Illinois and, as is elsewhere shown in this brief (p. 46), the Board transacts no business upon its property, and the business that it permits its members to transact thereon is mostly of a domestic and local, as distinguished from an interstate, character; and it seems that the power to impress

this property with a public use ought to belong to the state of Illinois alone.

Again, this section (5 (e)) is in no sense a proper exercise of the power.

This Exchange, its rules and by-laws, its exchange room and its members, should be considered jointly as constituting a local instrumentality of trade capable of rendering a service in the purchase and sale of grain, for which others are willing to pay. It is therefore not to be distinguished in character from privately owned inns, stage-coaches, etc. In all cases where the property involved is privately owned, the only interest therein that a statute may grant to the public (without paying for the property) is the right of all to share in the service it renders on fair and common terms.

This section is not for the benefit of the public generally, but only a certain class—farmers' organizations. Associations of millers, exporters, etc., are not given the right to force their members into the exchanges.

The Grain Futures Act does not undertake to compel the one thing that the common law and such statutes authorize. Its purpose is not to get for all producers of grain the right to have their grain sold on the exchange. They already have that. Nor is its purpose to better the service which the exchanges render, or to effect a change in the present rates of commission, which non-members must pay to their agents on the exchange for the sale or purchase of grain there.

There is no claim that the rates now charged are not as low as they should be, or that the service furnished by these instrumentalities is not efficient.

What The Grain Futures Act does is to force agents of farmers' organizations into membership in the exchanges, so that all farmers who join co-operative asso-

ciations may escape the payment of the commissions—which all others must pay—and thereby indirectly share in the profit which accrues from the rendering of the service—a profit which has resulted to the members of the exchanges from the creation and maintenance for many years (at private expense of money and effort) of these instrumentalities of trade.

This instrumentality or privately owned property—and the profit accruing from its use—like the grain elevator or insurance company, and the profit therefrom, belong to those who have created and own it.

Thus, in considering the application of the due-process clause to the present question, we should disregard the power to impress private property with a public use.

Any statute which takes private property for a private purpose—as well as one which takes property for a public use without the payment of adequate consideration—violates the due-process clause of the fifth and fourteenth amendments to the Constitution.

Mo. Pacific Ry. Co. v. Nebraska, 164 U. S. 403;

Missouri Ry. v. Nebraska, 217 U. S. 196;

Chi., M. & S. P. R. R. v. Wisconsin, 238 U. S. 491;

Eubank v. Richmond, 226 U. S. 137;

Cole v. La Grange, 113 U. S. 1.

The first of these cases has many points of similarity to the case at bar. Farmers of a certain county in Nebraska (Farmers' Alliance No. 365) had associated themselves together for the same purpose as sought by section 5 of The Grain Futures Act—to market their crops at cost—by constructing and operating a local elevator for their joint benefit. The statute of Nebraska prohibited railroads from giving any preference or advantage to, or subjecting to any prejudice or disadvantage, any person or locality, or any particular description of traffic in any respect whatever.

The railroad company had already leased to two private persons sites upon its rights of way for the construction of local elevators at that point, and this association of farmers claimed that the refusal of the railroad company to permit them also to construct an elevator on its right of way violated the foregoing statute, and the State Supreme Court so held. But this court held that this "was in essence and effect a taking of private property of the railroad corporation, for the private use of the petitioners," and not due process of law.

The fifth amendment applies to an intangible right as well as to tangible property.

Monongahela Co. v. United States, 148 U. S. 312, 343;

Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 229, 253.

Again, any statute which materially impairs the value or profitable use of private property is as much a taking within the due-process provision as the actual appropriation of it.

Peabody v. U. S., 231 U. S. 530;

Filor v. U. S., 9 Wall. 45, 49.

Indeed, a pecuniary loss need not be shown. If the right of property is invaded, the statute is within the constitutional provision.

"Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."

Buchanan v. Warley, 245 U. S. 60, 74.

A statute, therefore, which, like the one at bar, compels an unwilling owner to admit others into a right to

enter upon and use his property, violates the due-process provision, unless there is a taking for public use—in which case compensation must be made.

To apply these principles to the case at bar: This Board was by special charter created by the State of Illinois a *private* corporation with power to acquire and hold property. For more than sixty years the members of this Exchange have annually paid assessments or dues sufficient to meet the current expenses and create a large surplus, which is now represented by an exchange building in Chicago of the value (above a mortgage) of more than \$2,000,000. (Rec., 5.) This property is just as much privately owned as is any office building or private residence.

It is as much a violation of the due-process clause for Congress to give outsiders entrance into this building as would be a statute compelling owners of residences to admit roomers into their homes.

This Exchange, acting under a power expressly given it by its charter, has for sixty years confined access to and use of, a part of this property—its exchange hall—to such persons, as in the exercise of their discretion its board of directors should deem to be fit persons to there make contracts with other members. *Indeed, the basic right inuring from membership in this association is the right to enter this exchange hall and there trade.*

Many efforts have been made to get the Illinois courts to interfere with, and control, the exercise of this discretion and determine who should be its members, but always without success. (*Board of Trade v. Nelson*, 162 Ill. 431, 438; *People v. Board of Trade*, 80 Ill. 134.)

In one case involving a similar exchange (*American Live Stock Co. v. Live Stock Exchange*, 143 Ill. 210), the Illinois Supreme Court expressly held that the courts

were without power to compel the exchange to accept any person as a member.

The reason for this attitude of the courts is that confidence in the integrity of members lies at the basis of all trading.

McCarthy Bros. v. Minneapolis Chamber of Commerce, 105 Minn. 497, 501.

This Exchange has also thought it advisable (Rec., 4) not to permit any corporation to become a member; but it allows a corporation to make trades in its building, if *two* of its executive officers and substantial stockholders are members, and it makes these two members subject to discipline for failure of their corporation to comply with its business obligations.

By The Grain Futures Act farmers' associations may participate in the trading by having *one* representative admitted to membership.

Section 5 (e) compels this Exchange to admit to its exchange room—and the privilege of trading there with other members—*any* duly authorized representative of a co-operative farmers' association (which, of course, means that *all* such representatives must be admitted), provided only that the association—not the representative—has adequate financial responsibility. The representative need not be a fit person, if his association has sufficient financial responsibility.

Thus, the right which every exchange has—and must have in order to function properly—to admit into its exchange room and trading privileges only such persons as, in the judgment of its officials, are in point of character, business integrity and financial standing, fit persons to join in the trading, is, by this act, destroyed in favor of a certain class—farmers' organizations and their representatives.

The proper exercise of this discretion by the directors is of great importance to all trading members, because the first member to accept a bid in the "pits" gets the trade, and trades for very large amounts are made oftentimes in an excited and noisy market by mere word of mouth, and no opportunity is afforded to ascertain, before the making of the trade, the present financial responsibility of the trader. The rules requiring margins often afford inadequate protection when the markets are excited and the fluctuations are sudden and large.

Thus, the principal protection to traders is the character of the trader and the assurance—which the character of the trader only can give—that he will not go beyond his financial depth.

As respects farmers' associations, the Secretary of Agriculture is made the final judge. If the Exchange should refuse to admit a representative of such association which he—disagreeing with the directors—thinks has sufficient financial responsibility, he may direct the admission of the applicant, and if this shall be refused, he may deprive the Exchange of its designation as a "contract market."

Thus this Exchange is, by this Grain Futures Act, expressly deprived of its present charter right to say who may enter its privately owned exchange room and there enjoy the privilege of trading.

The state could—and Congress could, if this future trading were interstate commerce,—acquire, under the power of eminent domain, this exchange building, and make it a public market, to which all might resort under such restrictions as the legislative mind might see fit to impose.

This Grain Futures Act does not contemplate such a taking; nor does it seek to make these grain exchanges

public markets. For a market—to be public—must be one to which all classes of traders may resort. This act, as has been already shown, gives the right of access only to a particular class—co-operative associations of farmers.

The question here is not to be confined to the power as exercised by this act. "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." (*Brown v. State of Maryland*, 12 Wheat. 439.) If the power exists at all, it authorizes Congress to compel the admission to membership of *all* persons now pecuniarily disadvantaged by not being members, who may wish to enjoy the facilities, which the Exchange provides, for the purpose of *buying or selling* at cost.

The injurious results of such legislation should not be overlooked. This Exchange's principal source of revenue is the yearly assessment of its members, which now produces \$240,000 a year. (Rec., 5.)

Hence the Exchange must make it profitable for a sufficient number of persons to become and remain members; and this can be done only by making the value of the benefit that the membership confers upon the member exceed his share of the expense of maintaining the Exchange. If the members find no profit or advantage in trading, a membership will have little—and if any, only a sentimental—value, which would not be enough to induce members to pay the large assessment necessary to meet the expense of maintaining the Exchange.

There are several ways in which an exchange makes the privilege of membership valuable enough to attract members. (Rec., 5.) It maintains an exchange hall, where the making of trades is convenient and economical. It confines trading there to those who are members, thus making it necessary for non-members to employ members

as agents, if they desire to share in the trading. But, if Congress or a state may compel the exchange to give access to the salaried agents of all those, who would otherwise employ members to make trades on a commission basis, the business of making trades for others on a commission—which comprises a substantial part of the business of the members of an exchange—will be destroyed or seriously impaired, and it would no longer be profitable for that class of members to remain members.

But it is not enough for an exchange merely to confine trading to its own members and thereby enable them to profit by acting as agents for non-members. To function properly, it is necessary that it should attract and retain members of the right character and credit.

One of the things essential to the successful maintenance of an exchange is its disciplinary power over its members. It must compel them to abide by their contracts, and otherwise maintain a high standard of business integrity. An exchange can do this only by the exercise of its disciplinary power to expel or suspend members who are guilty of uncommercial conduct, or default on their contracts. But the fear of suspension or expulsion loses much of its deterrent influence when the privilege of remaining a member becomes of little value. Hence, all exchanges have found it necessary to give value to the privileges of the membership by prescribing minimum rates of commission to be charged by members when acting as agents for others.

This the courts recognize as a legitimate function of the exchange. (*Dickinson v. Board of Trade*, 114 Ill. App. 295; *State v. Duluth Board of Trade*, 107 Minn. 506.)

To render this commission rule effective, it is necessary to prohibit—as this Board does (Rec., 6)—members

from directly or indirectly rebating to their principals any part of their commissions.

It is alleged in the bill—and admitted—that this commission rule has materially added to the value of memberships on this Board. (Rec., 6.)

This Grain Futures Act entirely nullifies this commission rule as respects these farmers' organizations. It permits the farmers of a state, or of a wider territory, to join one association, designate one of its salaried officers as its representative, have him admitted to the exchange, and by the means of the "patronage dividends" have all their grain sold there *at cost*.

Thus, the present act impairs—and the full exercise of the power claimed for Congress would completely destroy—the right of this Exchange, not only to retain sufficient members to derive the income necessary to meet its expenses, but would also impair the disciplinary power of the exchanges over their members.

It therefore seems clear that section 5 (e) of the act violates the fifth amendment of the Constitution by depriving this Exchange and its members of their property without due process of law.

POINT X.

SECTION 6 OF THE ACT VIOLATES THE DUE-PROCESS-OF-LAW PROVISION OF THE CONSTITUTION.

This section provides that any person who "is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements," shall upon the complaint of the Secretary of Agriculture be tried before a commission consisting of

such Secretary and two other cabinet officers (all of whom are appointed by, and hold office during the will of, the President), and if found guilty, the commission may punish him by depriving him of all trading privileges upon all "contract markets" "for such period as may be specified in said order," which may be permanently.

As speculating in grain and acting as agent for such speculators are recognized by the law to be lawful vocations, and as the right to pursue any lawful vocation—sometimes called "the liberty of pursuit"—is a part of the liberty which the Constitution guarantees to every citizen, (*Butchers' Union v. Crescent City Co.*, 111 U. S. 746, 762; *Allgeyer v. Louisiana*, 165 U. S. 578, 589; *In the Matter of Jacobs*, 98 N. Y. 98), it follows that the punishment here authorized is a deprivation of liberty within the meaning of that term in the due-process clause. It differs from imprisonment—not in kind, but only in degree. The latter only deprives the citizen of more of his liberty than does the former. Indeed, depriving a trader or broker permanently—or for a long period—of his right to trade in any market would in most cases cause greater pecuniary loss—and thus be more severe punishment—than the maximum fine of \$10,000 which the district courts may impose under section 9 of this act.

The question thus is—whether, considering the offense created by, and the punishment provided therefor in, section 6, a trial by this commission appointed by the President, is "due process of law."

In determining this question, as stated by this court (*Murray v. Hoboken Co.*, 18 How. 272, 277), "We must examine the constitution itself, to see whether this process be in conflict with any of its provisions."

The provisions here pertinent are

“Article III. Section 1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior * * *

Section 2. * * * The trial of all crimes, except in cases of impeachment, shall be by jury; * * *

The sixth amendment provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation * * * to be confronted with the witnesses against him.”

A full appreciation of the meaning of these clauses requires a background of history. Sir Henry Maine says, in his “Ancient Law,” “that criminal law started as the business of the collective community to avenge its own wrong by its own hands, and ended in the doctrine that the chastisement of crimes belonged in a special manner to the sovereign as the representative of the people.”

In Rome the kings—and subsequently the consuls—reserved to themselves the judgment of criminal affairs, but subsequently the Valerian law gave an appeal to the people from a decision endangering the life of a citizen.

In early England too, the administration of the criminal laws became the function of the king, who established first the *aula regia*, presided over by the great officers of the state, who attended on his person and were, of course, subject to his influence, and subsequently the Star Chamber. The former subsequently became the King’s Bench. Criminal prosecutions in these courts, as Blackstone tells us, “continually harassed the sub-

jeet, and shamefully enriched the crown." So great was the injustice resulting from this close association of the executive and judicial powers in criminal matters that the Great Charter "prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer." (4 Blackstone 424.)

Thus the current was started in the opposite direction, and in the year 1700 the Act of Settlement provided that after the accession of the House of Hanover to the throne of England, judges' commissions should be made "*quamdiu se bene gesserint*" (during good behavior) and their salaries fixed, and that they should be removable only upon the address of both houses of Parliament.

Montesquieu, in his great work "Spirit of the Laws" (published in 1748), emphasized the fundamental principles that "in every government there are three sorts of powers," and "there is no liberty, if the judiciary power be not separated from the legislative and the executive."

When adopting its constitution in 1780, Massachusetts expressed this principle as follows:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: * * *"

And the same principle found expression in the early constitutions of some of the other original states.

Thus, when the Constitutional Convention met, it found this principle of the separation of sovereign powers firmly established in the public mind, and carried it into the Federal Constitution. Hence, the provision

that all exercise of the judicial power—which includes all criminal cases, that is, proceedings to punish in the interest of the public, any violation of law—must be carried to the *courts* established by Congress and presided over by judges who are independent of both the President and Congress.

The Constitution also requires that in all criminal prosecutions the accused shall be entitled to a jury.

In annulling a conviction by a military commission, this court said, in

Ex parte Milligan, 4 Wall. 2, 119, 121, 122:

“It is the birthright of every American citizen when charged with crime, to be tried and punished according to law. * * * Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it ‘in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,’ and it is not pretended that the commission was a court ordained and established by Congress. * * * One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.” In

Wong Wing v. United States, 163 U. S. 228, where under an act excluding Chinese labor, a Chinaman, unlawfully in this country, was arrested and brought before a commissioner of the United States court, who found him guilty and ordered his confinement in the house of correction for sixty days and his removal thereafter from the United States to China, this court, while sustaining the order of removal, held the act unconstitutional, so far as it permitted the commitment to jail.

because the crime made punishable by fine or imprisonment was not to be established by a judicial trial.

Huber v. Reily, 53 Pa. St. Rep. 112, 117, in which, in considering the effects of the foregoing constitutional provisions upon an act of Congress forfeiting the rights of citizenship of a deserter during the civil war, where one registered as a deserter had tendered his ballot to a judge of election who refused to receive it, the court said:

"The spirit of these constitutional provisions is briefly that no person can be made to suffer for a criminal offense unless the penalty be inflicted by due process of law. * * * It ordinarily implies and includes a complainant, a defendant and a judge, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding. * * * I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offense and the imposition of legal penalties, can be in any other mode than by trial according to the law of the land or due process of law, that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of elections or a board of election officers constituted under state laws is such a tribunal."

See also *Ex parte Randolph*, Federal Cases No. 11,558, where Chief Justice Marshall held an act of Congress providing for the issue of warrants committing to jail naval officers who were short in their accounts until such shortage was paid, was unconstitutional where the shortage was disputed.

Story on Constitution, Sec. 1946, says that "When life and liberty are in question, there must in every instance be judicial proceedings." See also

Ong Chang Wing v. U. S., 218 U. S. 272, 279;

Kilbourn v. Thompson, 103 U. S. 168;

State v. Ryan, 70 Wis. 676;

Parsons v. Russell, 11 Mich. 113, 121;
Addison v. State, 126 Pac. Rep. 840.

A crime is an offense against a public law and comprehends all offenses. (1 Chitty Cr. Pr. 14.)

A crime is a "wrong which the government notices as injurious to the public and punishes in what is called a 'criminal proceeding' in its own name." (1 Bishop Cr. Law, Sec. 32.)

In deciding whether a judgment in contempt proceedings is reviewable as a criminal case, this court has held, that, if the order compelled the unconditional payment of a fine to the Government, and was not one payable to the beneficiary of the order, or committing the defendant to jail until the order has been complied with, it "is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished."

Bessette v. W. B. Conkey Co., 194 U. S. 324.

Within these definitions, attempts to manipulate, or other violation of The Grain Futures Act, clearly constitutes crimes, which are punished solely in the interest of the general public. By depriving the violator of a part of his liberty it penalizes him for a wrong done to the public.

In this particular it is no less a criminal statute because, instead of compelling the wrong-doer to pay a money penalty or sending him to jail, it deprives him of his constitutional right to earn a living by trading on an exchange.

Section 6 authorizes the commission to punish one "violating any of the provisions of the act." Section 9 of the act declares a like violation a misdemeanor and punishable by a fine not exceeding \$10,000, or imprisonment not exceeding a year, or both. Section 9 contemplates a conviction in a criminal prosecution in the

District Court. If violating any of the provisions of the act is a crime under section 9 it cannot be less so under section 6. By declaring in one section that the forbidden act is a misdemeanor and not doing so in another section, Congress cannot make the same act at once a crime and not a crime within the Constitution.

Again, if section 6, so far as it penalizes the violation of "any of the provisions of this Act," is subject to these constitutional restrictions, so must also be that provision of section 6, which authorizes the commission to punish for "attempting to manipulate the market price of any grain." The same punishment being prescribed for both acts, one cannot be—while the other is not—a criminal offense.

There are, it is true, certain "petty offenses" which are not within the constitutional provisions above mentioned. Thus, the Oleomargarine Act, by imposing a fine of \$50 did not provide for a "criminal prosecution" entitling the defendant under the Constitution to a jury trial. (*Schick v. United States*, 195 U. S. 65.)

The Customs Administration Act, which authorizes the collector of the port to impose and collect additional duty where the importer has undervalued is held not to violate the Constitution. (*Passavant v. U. S.*, 148 U. S. 214; *Origet v. Hedden*, 155 U. S. 228.)

So an act of Congress authorizing an executive officer to impose a fine of \$100 upon every vessel owner bringing in an alien afflicted with a loathsome disease, and to refuse clearance papers until such fine is paid, is held not to define and punish a criminal offense, or to be the assertion of judicial power, either civil or criminal, but to merely entail the infliction of a penalty enforceable by a purely administrative action. (*Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320.)

But the conduct made punishable by section 6 is not such a petty offense.

Callan v. Wilson, 127 U. S. 540, where the conspiring to prevent another from pursuing a lawful vocation, for which one was fined \$25 and upon default of payment was to suffer imprisonment for thirty days, was held not a petty offense. To ascertain whether a proceeding of a criminal nature is "due process" resort should be had to the common law of England (*Murray v. Hoboken Co.*, 18 How. 277); and under that law "all unlawful endeavors to enhance the price," such as forestalling, engrossing and regrating were crimes, indictable and triable in courts possessing criminal jurisdiction. (4 Bacon's Abridgement, 335; *King v. Waddington*, 1 East 167; 4 Blackstone, 158; 2 Russell on Crimes, 1919.)

Surely no statute which permits by way of punishment one to be deprived of a part of his liberty "for such period as may be specified in the order" of the trial court, can be, within the letter or spirit of the Constitution, a mere petty offense.

Nor can Congress escape these constitutional provisions designed to protect the citizens against unjust criminal prosecution by adopting an unusual method of punishment. It is the nature, extent and effect—but not the particular kind—of the prescribed punishment, which must determine the character of the offense.

Nor are these constitutional objections obviated because section 6 permits a review of the orders of the commission by Circuit Courts of Appeals. The act creating these courts confers on them only appellate jurisdiction, except in bankruptcy, where a supervisory jurisdiction is also conferred. The Grain Futures Act does not attempt to confer on them any *original* jurisdiction. Their only jurisdiction is, upon the evidence taken by the

commission, "to affirm, to set aside, or to modify the order of the commission," and the findings of the commission as to the facts, if supported by the weight of evidence, are made conclusive. There is in those courts no trial *de novo*. The accused is not there confronted by the witnesses against him, as contemplated by the sixth amendment, which also includes the presence of the witnesses in the tribunal trying the offense. Nor is there in those courts any trial by jury. Surely the foregoing constitutional provisions are not met by merely giving the accused an *appeal* from a tribunal not sanctioned by the Constitution to an appellate court not authorized to grant the accused the protection which the Constitution assures him.

Is it not then clear that section 6 of The Grain Futures Act offends against the Constitution by creating and punishing an offense against the public of a character to be a crime, and by providing for a trial of such offense by a commission consisting of those holding office at the will of the President, instead of by a court possessing judicial power and presided over by judges holding office during good behavior and a jury?

The due-process provision and that part of the sixth amendment which requires that the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is also violated by section 6. This section penalizes any person "attempting to manipulate the market price." What is manipulation is nowhere in the act defined. All that a trader can do in these future markets is to buy or sell. Manipulation, therefore, on the short side of the market must consist in excessive selling. But the act does not attempt to declare beyond what quantity selling becomes an attempt to manipulate. This is left to the commission which the act creates to try the offender.

But Congress alone has power to define crimes against the United States, as this court decided in

United States v. Cohen Grocery Co., 255 U. S. 81, where it held unconstitutional that part of the Lever Act which sought to punish any person who wilfully made any "unjust or unreasonable rate or charge," or exacted "excessive prices for any necessities."

True, section 6 penalizes any attempt to manipulate in violation "of any of the rules or regulations made" pursuant to the requirements of the act—that is, by the Secretary of Agriculture. But this only makes the vice of the provision the more pronounced; for Congress may not under the Constitution delegate to an appointee of the President power to declare what shall constitute a criminal offense.

Section 6 also violates the Constitution in not being confined to such attempts to manipulate as prejudicially affect *interstate* commerce. (*Trade-Mark Cases*, 100 U. S. 82.)

But it may be asked, as under laws exacting licenses administrative officers are sometimes authorized to revoke them, why may not this commission do in effect the same thing?

But the right to revoke the license only exists where there is the right to issue it. As a method of collecting taxes, licenses are often exacted from all, because all must pay taxes. Here the license is not revoked, but one is punished for not having one.

But to the right to require licenses as a means of regulating conduct there are limitations. The power to thus regulate must exist. The government must have power to perform the particular function, of which the license is the instrument. So where the conduct of a business is not a matter of right, the right to revoke is one of the

express or implied conditions, to which the licensee consents. (*Schwuchow v. City of Chicago*, 68 Ill. 444.) Licenses to sell liquor, for instance, "are merely temporary permits to do what otherwise would be an offense against a general law." (*Metropolitan Board v. Barrie*, 34 N. Y. 657, 667.) In the same class are licenses to doctors, lawyers, pilots, etc. The possession of requisite skill is there essential to the public welfare. No one has the inherent right to follow such a calling.

When one has, under the Constitution as a part of his liberty, the right to do an act or pursue a calling, a license may not be required from him as a condition of doing so. (2 Cooley on Taxation, 1137.) Thus a license may not be exacted as a condition of the right to use for travel a public thoroughfare (*City of Chicago v. Collins*, 175 Ill. 445); nor as a prerequisite to the pursuit of the vocation of a blacksmith. (*Bessette v. People*, 193 Ill. 334.) Nor to be a partner with a plumber. (*Schnaier v. Navarre Hotel Co.*, 182 N. Y. 83.) (See also *Royall v. Virginia*, 116 U. S. 572.)

The right of a state to exact a license as a means of regulation is a part of the police power (*Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 374), and is subject to its limitations.

While Congress may regulate interstate commerce by means of licenses, the power to so regulate internal or domestic commerce belongs exclusively to the states. (*License Tax Cases*, 5 Wall. 462, 470.)

It is hardly conceivable that the Constitution, in conferring interstate-commerce power on Congress, intended to authorize it to exact licenses from every person engaged in making intrastate contracts for future delivery and make them revocable by an executive officer as a means of preventing some from obstructing interstate

commerce. The State of Illinois could not exact a license from every person desiring to make a contract for the future delivery of grain within the state. No more could Congress.

But we need not pursue this question any further, because Congress has not undertaken in The Grain Futures Act to exercise the power to license those engaged in this intrastate future trading.

It is therefore submitted that section 6 of the act, so far as it confers on this commission jurisdiction to try persons for overtrading, and to punish them by depriving them of the right to resort to the exchanges, is unconstitutional.

This question directly arises on this appeal; for the suit is not merely one by the Board of Trade, but also by seven members of the Board (suing on behalf of all of them) to restrain a public official (the Secretary of Agriculture) from enforcing—as prosecutor—what is a criminal provision—it being, as the bill alleges, his purpose to enforce it.

XI.

WHAT THE PRICE-CHARTS SHOW.

When there is a preconceived purpose to do something, there is naturally among legislators, as well as others, a disinclination to come in close contact with troublesome facts. This perhaps will account for the fact that, before characterizing the prices in this future trading as “sudden or unreasonable” and the result of manipulation, the committees of Congress did not take the trouble to ascertain what these fluctuations had been.

These charts supply that information. They show “cash” prices, except where on the eighty-one years chart the light lines indicate also future prices.

The World's War started late in July, 1914. This country declared war on April 6, 1917, but Congress did not pass the Wheat Control Act until August 25, 1917, when future trading ceased. That control ended on June 1, 1920, but future trading was not resumed until July 15, 1920. During such control, the Government during part of the time fixed both maximum and minimum prices (when there were no fluctuations) and at other times fixed only a minimum price, which permitted violent fluctuations. When the Government released its control, there was necessarily a rapid deflation and a quick drop to the lower level of prices determined by world conditions, as has been the case after every great war. These Post-War conditions have been since July, 1920, so abnormal that wider fluctuations than usual were inevitable. After the World's War started in 1914, and especially after our entry into the war, the wheat market was a wild one because of the insistent buying of wheat in this country by the Allies. During this period, as the charts show, the fluctuations were very violent and even greatest during Government control and when future trading was suspended.

Therefore, it follows that these charts are mainly instructive—as respects the questions in this case—because they show the course of prices prior to July, 1914.

The deductions from these charts are:

1. That there have been no corners in wheat at Chicago since 1898, thus confirming the statements of Senator Capper and Professor Emery that corners are a thing of the past. (See pages 21, 22, of this brief.) During the period of future trading, a corner is indicated by a high price on the last few days of the month followed by a sudden decline to a lower level on the first day of the succeeding month. When there is a corner in

the future price, the cash price in the same market inevitably follows the future price.

2. That corners in wheat in Chicago were more frequent before future trading on the exchanges became a practice.

3. That fluctuations in prices of wheat (during peace times) were much more sudden and violent before future trading was adopted than they have been since, thus confirming the views of the Political Economists—whom we have quoted (pp. 29-35)—that future trading has made fluctuations less sudden and less violent.

4. That in many of the years of future trading the prices in the fall were higher relatively (that is, when the carrying charges are considered) than they were in the following spring, and that during all the period of future trading "orderly marketing" has prevailed—which we mean that the differences between the spring and fall prices have been only reasonable ones—thus confirming other like evidence mentioned on page 30 of this brief and disproving the charge of Senator Capper that the speculators deliberately depress prices in the fall to mulct the farmer.

5. The Chicago and New York prices are at times (see five-year chart) absolutely, and at other times relatively, higher than Liverpool (the transportation charges are more than ten cents a bushel), thus showing that the speculators, instead of depressing, hold up prices through their unwillingness to sell at the prices offered by the Liverpool buyers.

6. The Chicago prices are often (see five-year chart) higher than the New York prices—sometimes absolutely and at other times relatively, when the transportation cost is considered. This shows that Chicago speculators, instead of depressing, are maintaining prices as against New York buyers.

7. There are at times pronounced variances in relative prices in the different markets (see five-year chart) which tends to prove that no single factor—such as excessive short-selling in a single market—materially affects prices in other markets. Thus the Minneapolis prices are at times higher than in the other markets, even including Liverpool, especially during the months of June, July and August, which is the end of the spring wheat crop year—Minneapolis being principally a spring wheat market. This indicates either a short crop of *spring* wheat or that the millers of that territory have allowed too much of the available supply to be shipped east. It is to be here borne in mind that Minneapolis is a very large milling center. So, too, the cash prices in Kansas City are at times higher than in other markets (sometimes including Liverpool). This indicates either a short crop of winter wheat (Kansas City being in the winter wheat country) or that the millers in the Missouri River district were slow in making their purchases.

8. That these Minneapolis prices are not as a rule higher at the same times that the Kansas City prices are higher than other markets, which negatives the theory that cash prices follow future trading in Chicago. Otherwise, we should have higher prices in both places during the same time, and Chicago prices should be relatively higher.

9. The cash prices are often above the future prices, and at other times are nearer the future prices than the cost of carrying the grain from the present to the future delivery time, which shows that cash prices are not fixed by future prices; but these variations are to be accounted for by temporary shortage of the actual grain or other trade conditions.

The cash price and the price for wheat deliverable during the current month will draw together,

because sellers for delivery during that month will buy to deliver whenever it is more profitable than to close their sales by counter purchases.

10. That during the 43 years of future trading (1871-1913) the average Chicago price of wheat has been more than fifteen cents a bushel higher than it was for the twenty years immediately before the Civil War, when there was no future trading.

It is, therefore, respectfully submitted that this cause should be remanded for a decree in favor of appellants, unless a hearing upon evidence is deemed necessary, in which event a temporary injunction should be ordered.

HENRY S. ROBBINS,

Counsel for Appellants.

An Act For the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, This Act shall be known by the short title of *The Grain Futures Act.*"

SEC. 2 (a) For the purposes of this Act "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside there-

of, or within any Territory or possession, or the District of Columbia.

(b) For the purposes of this Act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including in addition to cases within the above general description all cases where purchase or sale is either for shipment to another State, or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

SEC. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate

commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

SEC. 4. It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof, except—

(a) Where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is the grower thereof, or in case either

party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners, or growers of grain, or of such owners or renters of land; or

(b) Where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided*, That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

SEC. 5. The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where cash grain of the kind specified in the contracts of sale of grain for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the differences in value between the various grades of such grain, and where there is available to such board of trade official inspection service approved by the Secretary of Agriculture for the purpose.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, of reports

in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consummated at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof, of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices or the cornering of any grain by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in, and all privileges on, such

board of trade, any duly authorized representative of any lawfully formed and conducted co-operative association of producers having adequate financial responsibility which is engaged in cash grain business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided*, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) of section 6 of this Act.

SEC. 6. Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with any of the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided*, That such suspension or revocation shall be final and conclusive unless within fifteen days after such suspension or revocation by the said commission such board of trade appeals to

the circuit court of appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided, further,* That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described

therein, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) If the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereof to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this Act the provisions, including penalties, of section 12 of the Interstate Commerce Act, as amended, relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this Act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person

all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. In proceedings under paragraphs (a) and (b) the judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

SEC. 7. Any board of trade that has been designated a contract market in the manner herein provided may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least ninety days prior to the date named therein as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a

contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

SEC. 8. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of this Act, and may publish from time to time, in his discretion, the result of such investigation and such statistical information gathered therefrom as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers: *Provided*, That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary relative to the conduct of any board of trade or of the transactions of any person found guilty of violating the provisions of this Act under the proceedings prescribed in section 6 of this Act: *Provided further*, That the Secretary of Agriculture in any report may include the facts as to any actual transaction. The Secretary of Agriculture, upon his own initiative or in cooperation with existing governmental agencies, shall investigate marketing conditions of grain and grain products and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by

means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions in this and other countries that affect the markets.

SEC. 9. Any person who shall violate the provisions of section 4 of this Act, or who shall fail to evidence any contract mentioned in said section by a record in writing as therein required, or who shall knowingly or carelessly deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

SEC. 10. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 11. No fine or imprisonment shall be imposed for any violation of this Act occurring before the first day of the second month following its passage.

SEC. 12. The Secretary of Agriculture may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams,

telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and there are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

Office Supreme Court, U. S.
FILED

JAN 11 1923

WM. R. STANBURY

CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1922.

No. 701.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Appellants.

vs.

CHARLES F. CLYNE, United States District Attorney, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

Appendix to Brief for Appellants.

HENRY S. ROBBINS,
Counsel for Appellants.

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APPENDIX TO BRIEF FOR APPELLANTS

[In all the extracts appearing in this Appendix, portions thereof have been italicized to enable the court to more readily see the more essential parts of these extracts.]

EXTRACTS FROM THE REPORT OF THE INDUSTRIAL COMMISSION
CREATED BY ACT OF CONGRESS.

By Act of Congress, June 18, 1898, a commission, called the "Industrial Commission," was created, to be composed of five members of the Senate, five members of the House of Representatives, and nine other persons, "who shall fairly represent the different industries and em-

ployments," to be appointed by the President by and with the advice and consent of the Senate.

This Act made it the duty of this Commission (among other things)

"to investigate questions pertaining * * * to agriculture, * * * and to business, and to report to Congress *and to suggest such legislation as it may deem best upon these subjects*," and "to furnish such information and suggest such laws as may be made a basis for uniform legislation by the various States of the Union."

Authority was conferred upon it to send for persons and papers and to administer oaths. The term of the Commission was originally two years, but was subsequently extended until February 15, 1902.

(Act of 1898, Public—No. 146.)

On January 15, 1901, this Industrial Commission prepared a partial report on the Distribution of Farm Products (Volume VI of its reports), parts of which follow:

"The first fact to be recognized in the survey of the American system of distributing farm products is that it is essentially a speculative system from beginning to end—speculative in the sense that after the products pass out of the producers' hands and until they pass into the consumers' control there is not a moment nor a stage in the distributive movement during which the one who has legal control over the property in question does not run the risk of a rise or fall in the value of the property. * * * In brief, the risks of distribution are shifted by both producers and consumers upon the distinct class of speculators known as distributors, who make it a business to take such risks and to divide them up among themselves on the basis of net profit on capital and cost of business capacity. This, in the final analysis, is the underlying fact in the system of distributing farm products in the United States. (pp. 5 and 6.)

* * * *The facts examined show that in the course of the past 25 years there has been a constant*

tendency toward a reduction in the difference between what the producer receives and what the consumer pays. In other words, the existing commercial system of distribution of farm products inevitably tends, under equitable laws and responsible uses of capital, to cost society a decreasing proportion of the value of the farm products. With the reduction of risks of trade the reduction of rates is inevitable. (p. 6.)

* * * The shipper simply ascertains by what ways and means the transfer from producer to consumer can be effected most economically. To err is to eliminate himself. * * * An attempt to impose even a triflingly small excess of charges on cotton or grain at one distribution point will be taken advantage of by competing points. * * * Distribution of our main crops proceeds, on the whole, by the lines of least outlay between producers and consumers. (pp. 6 and 7.)

* * * A conspicuous feature of the American grain market is the existence of a large visible supply during the greater portion of the year between harvests. Grain, especially wheat, passes out of the farmers' hands early in the season, for good and sufficient reasons, and remains piled up as surplus stock in the country for distribution during the next nine months as the consuming world may require it.

The depressing effect of this large stock of visible wheat upon the market, from the producers' point of view, is inevitable; but it relieves the consumer and the trader, who stands next to the consumer, from anxiety as to where his future supply is to come from. This is one of the causes for the low level of farm prices of wheat under the present methodical system of collecting the crop soon after the harvest and holding it ready for dispersal to whatever part of the world may want it most. Another factor in depressing American wheat prices is the fact that three-fourths of the world's wheat supply comes upon the market within 3 months out of the 12, causing a congestion of stock, which determines the price for the other 9 months of the year. * * * The consumer, however, shares the advantage with the distributor who carries the stock and disperses it as required at such rates of compensation as the competitive

conditions of modern trade, together with his individual foresight, enabled him to get for his services. *It can not be shown that the producer is the victim of an uneconomical system of grain distribution.* (p. 12.) * * *

* * * Why has commercial distribution in the United States become so largely identified with a speculative class of trading capitalists? The answer is, that it has been found best for the producing and the consuming interests of the community that the risks of distribution should be localized in a separate commercial class whose members are in a position to inform themselves as to all the factors, past, present, and prospective, affecting the future course of prices. If the risks of distribution fell upon the farmer, it would increase materially the risks of capital required and thus raise the rate of interest he should have to pay as producer, because increased risks always raise the rate of interest. This would increase the cost of production and consequently tend to reduce consumption by rise of price to consumers.

* * * Now it is the speculator who has to decide in advance on the price at which a regular supply will in all probability be forthcoming from producers in sufficient quantity to meet the regular requirements of the consumer. One speculator might place the future market price too high, another too low, but as a class they correct and check one another. It is to their interest as distributors to call forth all that the consumer will take, and no more. *Speculators as a class are, therefore, interested primarily in a correct judgment, as much so as is either the producer or the consumer of the product in which the trader speculates.* (p. 28.)

* * * The scope of this task of forming a judgment upon world-wide conditions, and forming it accurately enough to stake millions of capital upon it, is perhaps the heaviest hazard in our whole modern economic organization of society. But some class of investors must do it, or consumers must pay a higher price for their product, and producers must be content to enter the market with fewer competitors ready to buy and carry their surplus. Producers and consumers together, without the speculative mechanism at work, would have to divide the risks of dis-

tribution between them. Neither of these interests is prepared to do this. Sound commercial policy is the best served by a rational division of distributive labor, in which economic freedom and economic responsibility are equally respected.

The economic services of speculative agencies engaged in distributing farm products are threefold:

1. They localize industrial risks among a commercial class whose special function it is to distribute surplus supplies over deficit times and places in such a way as to lessen the uncertainty of producers and consumers.

2. They relieve producers and consumers from carrying a whole year's stock, enabling the former to convert his crop promptly into cash capital and the latter to supply himself as his periodical needs may require without enhancing prices beyond the ordinary rate of risks and returns of such capital investments.

3. Competition of speculative dealers tends more than any other force to reduce profits of these agencies to a minimum per unit of commodity handled.

* * * (p. 29.)

WHAT MAKES FARM PRICES? (p. 29.)

* * * The price which the local buyer pays rises or falls with the demand in the wholesale centers to which the local buyer ships his supplies. The local buyer receives his prices from the wholesale centers through the dealers or commission men. The price to be paid the producer in the country for a given day is determined by the trade interests in the large receiving centers on the basis of commercial conditions. They act either individually or collectively in sending out their quotations to local buyers, stating the prices at which they are willing to receive products of the character in which they deal.

* * * *Another fact makes it practically impossible for any important center of distribution to depress farm prices.* Even the wholesale dealer who depends on the daily rural supply to meet the demand of the retail trade is obliged to take into account the prices which other receiving centers are paying for the same products. * * * In fact, the greatest force in the distributive system making for reduction of distributing expenses of handling farm prod-

ucts is the competition of the wholesale markets in large distributing centers for the products of the farm originating in the territory from which two or more cities draw their daily supplies. A lower or a higher price in one of these markets than is offered in any other turns the tide in the direction of the other and practically eliminates the supply from the former market. *A wholesale market which keeps itself out of line with other markets simply takes its own life by attempting to maintain an unduly low farm price.* (p. 30.)

WHY WHEAT PRICES STAY LOW.

* * * The market price of Columbia River wheat, like that of our surplus wheat generally, is fixed by the deficiency in the foreign supply from domestic sources of each country. All deficit countries go into the world market to get a portion of the surplus from such countries as have wheat to spare. If the deficit countries together have a large shortage they become all the more active bidders for the world's surplus wheat. If that surplus is less than usual the bidding is all the more active. *Whether prices for American wheat are higher or lower depends altogether on such things as are beyond our own control at the time.* A large European deficit and a large American surplus may not raise prices at all. A small European deficit and a small American surplus may likewise leave prices where they have been. Only in those years when it happens that there is a shortage in deficit countries large enough to create an extraordinary demand for our surplus do our prices really show much rise. * * * (p. 34.)

* * * The question to be answered in this discussion is: 'Does speculation tend to lower prices?' If so, are the fluctuations of such a character as to injure the interests of the farmer as against those of the dealer or speculator?

That speculation tends to lower prices permanently even the most outspoken opponents of the system of dealing in futures have not undertaken to charge. What is generally urged is that the professional short seller, by his sales of fictitious wheat or cotton, creates a fictitious oversupply in the market, which is just as instrumental in depressing prices

as would be an abnormally large supply of actual wheat thrown on the market by the farmer.

* * * To sum up: *While the short seller may at times be in a position to depress future prices by creating a fictitious oversupply, when it comes to spot prices, i. e., the only prices which are of any practical interest to the farmer, the 'bear' appears as a buyer and thereby, if at all influencing prices, must raise them.*

* * * *Even if we were to admit that the speculative purchases and sales for future delivery could affect current spot prices, the opposite effects of the transactions of the bull and the bear would balance each other.* * * * *It may be urged that the same quantity of wheat, which would have been sold but once by the farmer, is now offered first by the farmer to the short seller, next by the short seller to the long buyer, and finally by the latter again to somebody else, thus swelling the apparent supply and tending to lower prices. But in all such cases the fictitious supply has been met by a fictitious demand, which have all been balanced long before the month for which the contract had been concluded has arrived. (pp. 189 and 190.)*

Our analysis thus shows that as far as there is a speculative influence in depressing prices, it is not exercised by the much abused short, but by his opponent, the bull. (p. 190.)

* * * *Spot prices may and may not move in sympathy with the future prices, according to conditions of actual demand and supply.* * * * *This explains why spot prices are sometimes above future prices for the same month, although, as a rule, the latter are higher than the former by the amount equal to the cost of storage of the grain in the warehouse.*

* * * *The professional speculator is in the market not for the purpose of either depressing or raising prices. He is as ready to make money on a rise as on a fall in prices. In either case he will try to ascertain what the probable tendency of the market is before he embarks in any undertaking. (p. 190.)*

* * * *On the contrary, prices of wheat futures are as a rule somewhat above spots by the amount equal to the cost of storage, insurance, etc. (p. 191.)*

* * * *This leads to the conclusion that so far from being the cause of low prices short selling is rather a consequence, in the sense that it is indulged in only when it is thought that the natural tendency of the market is such as to favor a trend of low prices.*

* * * *According to the law of supply and demand, prices of wheat and cotton should be lowest immediately after harvest time, when the supply of these products is the highest during the year. If speculation has any effect upon the prices of these commodities, it should reveal itself in the form of some kind of a modification of that law. If the charges of those who are opposed to 'future' dealings are justified—if the effect of speculation is to depress prices to the producer—then we should find prices under a speculative system to be much lower at the time succeeding the harvest, as compared with prices at other seasons of the year, than under a nonspeculative system. (p. 192.)*

(The commission refers to tables disproving this charge.)

* * * *According to Professor Bemis 64 per cent of the total wheat crop is received at Chicago in the course of the 4 months from August to November. (p. 193.)*

* * * *The average price for the same three months (September, October and November) for the twenty years (1840-1859) of the nonspeculative period is \$1.284, the annual average \$1.3358—that is, under the nonspeculative system the farmer received a lower price than the average price prevailing during the rest of the year. That again does not look as though the farmer has been hurt by speculation. On the contrary, with the wide dissemination of knowledge of the condition of crops at home and abroad and of prices ruling in the principal markets of the world, which is the direct result of organized speculation, the farmer has evidently been more able to take advantage of favorable conditions than he was before. (p. 194.)*

* * * *That is, under speculation, while fluctuations of prices are more frequent, they do not reach so wide extremes as they used to. That is another beneficent result of the wider dissemination of knowledge of conditions brought about by speculation as*

well as other influences working in that direction, but which we can not discuss here. (p. 195.)

* * * Again, if the charges of the opponents of speculation in futures are true, that the object and effect of speculation is to depress the prices paid to the producer by fixing the 'future' price at a uniformly lower rate than the spot, we should expect that the September and October 'futures' in the month of July should be lower than July spot prices. What do we find to be the fact? Out of 15 years represented on the diagram there were only 6 years when July prices for September or October delivery were below the July spot prices, in the other 9 years the relation between the 2 sets of prices being reversed.

This, of course, is no more due to the kindly solicitude of the speculator for the welfare of the farmer than the opposite state of affairs, to any hidden conspiracy on the part of the former against the interests of the latter. It is all the result of *concurrent forces and conditions which go to make up the totality of the market* and which serve rather as a guide to the speculator in his movements than as a result of his action. (p. 204.)

* * * The depression in prices of agricultural products during the few years previous to 1898 has been no doubt responsible for most of the opposition to speculation in 'futures.' The several interests connected with the raising and marketing of these products feel that 'something is wrong,' and in search for the cause of the evil naturally turn against speculation as the most prominent factor in modern business life. *That the condemnation of speculation is the result of misunderstanding and bitter feeling rather than intelligent research* may be seen from the fact that it is quite frequently made on conflicting grounds, according to the interests involved. (p. 222.)

* * * As we have attempted to show, *it is a mistake to represent speculation in futures as an organized attempt to suppress prices to producers:*

First. Because every short seller must become a buyer before he carries out his contract.

Second. Because, as far as spot prices are concerned, the short seller appears as a buyer and not

as a seller, and therefore, against his own will, is instrumental in raising prices.

Third. Because, as far as 'future' prices are concerned, the 'bull' in speculative buying counteracts the effects of speculative selling of the 'bear.'

Fourth. Because the 'bull' in his realizing operations when depressing prices, is counteracted by the opposite effect of the 'covering' movements of the 'bear,' the two sides thus keeping the market price about where it would be kept in the long run if instead of 'bulls' and 'bears' there would be ordinary legitimate buyers and sellers.

Fifth. Because, as has been shown, future sales are not made at a uniformly lower price than the corresponding spot price, but on the contrary are on the average a little above spot prices to meet the cost of storage, interest, and other charges.

Sixth. Because, as has been shown, neither the 'bears' nor the 'bulls' are uniformly on the winning side, but are about equally losers and winners, thus proving that one is about as important and influential a factor in the market as the other.

Seventh. *Because evidence believed to be conclusive has been presented showing that, under speculation, prices prevailing at the time when producers dispose of the greater part of their products are greater in comparison to the rest of the year than they were before the advent of modern speculation.* (p. 223.)

* * * A further comparison of prices may be made in a somewhat different form. We may first compare prices at different times at the same place, as, for example, present (spot) and future prices at Chicago; we may, secondly, compare prices at different places such as Chicago and Liverpool. *The purpose is to show that such differences in time prices are not caused by speculation, but can be adequately accounted for by the natural condition of supply and demand; and that differences in place prices can be explained just as adequately by the expenses of distribution. By time prices are of course meant prices based on difference in time at a given place; and by place prices, prices based on difference in places at the same time.* (p. 223.)

* * * Chicago is the supply end of the wheat trade, just as Liverpool is the demand end." (p. 224.)

On February 10, 1902, this Industrial Commission made its final report to Congress (Volume XIX). Its letter transmitting the report is in part as follows:

"* * * This is Volume XIX and is devoted to historical reviews of the subjects to our inquiries, and to 'recommendations for legislation,' with appendixes relating thereto. * * *

In the first place, it was the aim of the Commission to select only the most competent witnesses, although, of course, there were, in the nearly seven hundred examined, a few who sought to be heard, and some of them, perhaps, for personal as well as public reasons. *As a rule, however, the evidence is that of the chief men in business or the heads of business departments, public officials, leaders of organized labor, and experts who have given the subjects exhaustive study.* * * *

Besides taking testimony, the Commission has availed itself of much other authentic information, gathered chiefly from official documents of the Nation and the States, from the decisions of courts, and from the researches of experts. * * * It is not presumptuous to say that most students of these reports will find many revelations of business methods and complications of which they knew little before, and will have a liberal education in the economic problems of the day. * * *"

The final report is in part as follows:

"HOW PRICES ARE GOVERNED. (XIX, p. 135.)

* * * A third factor is speculation. Much of the testimony on this subject is conflicting. It is certain that speculation in future prices does have a more or less intimate connection with actual values of farm products, but *no evidence has been conclusive enough to show whether variations of actual values have been caused by speculative variations, or whether speculative changes have been the result of changes in actual market values.* *Of farm products it is probably correct to say that speculation does not govern prices except so far as the speculative*

prices enable the buyer or seller of actual goods to anticipate the probable course of prices at a future time. If this be a fair statement of the weight of evidence, then the speculative market must be looked upon as a buyer's barometer, which more or less faithfully reflects the estimate of the market. It has not been denied that the producer constantly avails himself of this indicator of values in determining whether to withhold or dispose of his crop. (*Id.* 136.)

* * * Grain prices stand in a somewhat different relation to the two branches of the market demand. The domestic demand requires three-fourths of the supply of wheat and nine-tenths of the average annual market supply of corn. The remaining one-fourth and one-tenth, respectively, are required for the foreign demand. *The general level of prices is the result of both demands, foreign and domestic.* The level of prices resulting from the influence of the domestic demand on the domestic supply is always subject to being raised or lowered by the foreign demand. *In this sense the foreign demand for the American surplus fixes the range of prices for the crop as a whole.* Foreign scarcity raises American prices somewhat higher, and foreign abundance depresses prices here by lack of demand. (*Id.* 146.)

XI. PROBLEMS OF GRAIN AND COTTON MARKETING. (*Id.* 177.) * * * SPECULATION IN AGRICULTURAL PRODUCTS.

It has frequently been urged that there should be remedial legislation in order to protect the producer from the speculator. *Dealings in 'futures' have at different periods since the rise of produce, grain, and cotton exchanges in the United States been looked upon as one of the chief factors governing the prices of farm products.* That is, speculative agreements as to future values have been regarded as causing a rise or fall in the prices of agricultural products.

This earlier view of speculative trading has been considerably modified by a more complete insight into the relation which speculation bears to commercial methods. It is now more generally held that speculation in its legitimate and normal function is primarily occupied in anticipating the price at which under all circumstances the producers' supply is likely to yield to the consumers' demand. The ad-

justment between these two factors—supply and demand—is all the more delicate because with each recurring year they exhibit more or less elasticity. The positions of producers and of consumers change. The commercial judgment must be recast each successive season and at all stages of the season. This task must be classed among the really valuable services of speculation in distribution.

The three great functions which speculation performs in a free system of trading are, first, to localize the risks of distribution among a special class of experts presumably well informed as to the facts of supply, demand, credit, exchange, and cost of distribution. Second, to relieve producers and consumers alike of the expense and risk of being responsible for a year's production, thus freeing the cash income of both of these economic interests for other uses than those of protecting and providing a long-term supply of utilities. Third, to reduce the profits of trade by ready and active competition among the various speculative interests toward a minimum of cost per unit of commodity handled, by conducting distributive operations on a large scale.

Throughout the East and the West it appears to be the general practice of millers on a large scale, who make contracts for delivering flour in the future, to purchase in the market for 'futures' a corresponding quantity of wheat against the contract for the delivery of flour which they have assumed. This system, as stated by entirely trustworthy representatives of the trade, has been found absolutely necessary in order to prevent the miller from assuming the extraordinary risks of changes in the market value of wheat. Only the more speculative and daring millers would undertake to fulfill future contracts without exercising this precaution of purchasing wheat 'futures.' In considering the question of whether buying and selling of 'futures' is consistent with the welfare of the producer, this aspect of the practice must be regarded as buying and selling insurance against loss.

The economic position of warehousemen in handling agricultural products under the present system is somewhat similar to that of the miller. The warehouseman with a million bushels of grain in storage is obliged in some way to secure himself

against loss from fall in cash prices in the future by selling 'futures' at a price which will cover his outlay. He thus absolutely eliminates that million bushels of grain from the class of risks which the business has to run.

A common evil of the grain, cotton and provision trades is over-speculation. Over-speculation is a result of the attempt to do too large a volume of business on a given amount of cash capital. The amount of cash capital which a trader can command depends very generally on the amount of credit which his bankers are willing to give him. It is therefore largely in the power of these trustees of the community's cash capital to check or favor over-speculation. Any laws that will fix and enforce upon banking institutions the responsibility for extrahazardous uses of funds intrusted to them, whether by their customers or the officers of banks, will go far toward checking over-speculation. (*Id.* 185-6.)

* * * RECOMMENDATIONS. (*Id.* 197.)

* * * We therefore recommend:

1. That the Secretary of Agriculture be given authority— * * *

(b) To fix standard grades for cereals, based on season of growing, quality, and weight per measure, and, when intended for export, to inspect and certify the same. * * * (*Id.* 198.)

[The report is signed by 15 of the 18 members of the Commission, and contains no recommendation for legislation as to exchanges or the marketing of grain except as above indicated.]

EXTRACTS FROM

TRAITE THEORETIQUE ET PRATIQUE D'ECONOMIE POLITIQUE.

By Paul LeRoy-Beaulieu. Membre de L'Institut, Professeur D'Economie Politique au College de France, Directeur de L'Economiste francais.

Librairie Guillaumin et Cie. Paris. 1896. Vol. 4, pp. 60-64.

(TRANSLATION.)

*"The claim is often made in the United States and in Germany that future trading should be prohibited because it causes low prices of commodities. It is said that the big volume of selling frightens the owners of commodities into selling at any price. * * * There is little foundation for this reasoning, for future trading, so far as prices are concerned, tends as much to raise prices as to lower prices—much more often indeed to do the former. * * **

*In itself, future trading no more tends to lower prices than to raise prices. * * * Should future trading be prohibited? There is no sound reason for doing this. * * * The question resolves itself into the question of speculation. Considering all the effects of speculation, both good and bad, is it useful or harmful to society? The answer is certain: Speculation, after full account is taken of its evils and its benefits, of its advantages and its disadvantages, is one of the forces indispensable to human progress. * * **

Without in any way denying the abuses which sometimes occur through combinations and speculations, these abuses seem to us far less dangerous than the regulations aimed to prevent them."

EXTRACTS FROM

VOL. 40 OF THE PARLIAMENTARY DEBATES (of England)
in 1896, pp. 323 to 335, inclusive.

On May 1, 1896, when Germany was enacting its repressive legislation on future trading, one of the members of the House of Lords stated that certain evidence had been taken at the request of the English Royal Commission on Agriculture, which tended to show that future trading depressed the price of wheat, and asked why this evidence had not been printed; and he concluded with a formal motion for the papers on the subject, whereupon the Earl of Dudley, on behalf of the Government, replied in part as follows:

“Under these circumstances I feel sure that your Lordships will not feel inclined to adopt the suggestion of the noble Lord and appoint a Select Committee to inquire into this subject. * * * Of course there can be no doubt that there has been a *very large fall* in the price of some of the products to which the noble Lord has referred, but I venture to think that it is by no means proved, even after the speech of the noble Lord, that that fall in price is in any way due to the system of which he complains. *To say that price is governed by the laws of supply and demand is merely to use a truism, but it is, I believe, a fact that that law holds good even in the speculative market, and that the unanimous opinion of the best experts is that the price in those markets follows and does not lead the price dictated by the laws of supply and demand. In fact, they are of opinion that this system of dealing in ‘futures’ instead of deteriorating prices, rather tends to equalise them and to counteract the fluctuations that always must exist.* * * * The noble Lord has referred to the many attempts that have been made, chiefly by Mr. Smith and others, to distinguish between purely legitimate speculation and gambling enterprise, but all those attempts to differentiate have failed, and I doubt very much whether it would be possible to draw any distinguishing line of that kind in an Act of Parliament, without running very grave risk of hampering trade and checking legitimate enterprise.”

The Prime Ministers also opposed the motion, whereupon it was withdrawn.

EXTRACTS FROM

A TRANSLATED ARTICLE ON THE GERMAN ANTI-BOURSE LAW
OF 1896.

By Dr. Georg Wermert. (Appearing in Conrad's Jahrbücher, Jena, 1901. Vol. 77, pp. 793-853. Quotations from pages 828-853.)

(HOW THE 1896 LAW WORKED.)

“* * * Many small traders had, on account of these restrictions, withdrawn from the Bourse. On

the other hand, some big firms found the opportunity of making enormous middleman's profits, since there were no quotations and no future trading. For the whole world will not give up future trading any more than it will give up railroads, telephones and telegraph. Every cargo of grain for which no hedging is possible on the Berlin Futures market will be hedged elsewhere. The state or the city alone is injured where the experiment (of prohibiting future trading) is carried out.

* * * In the Austrian Inquiry it was stated that the price of wheat in Germany by the cessation of future trading, was depressed below the world wheat price level; in confirmation of this statement I wish to call attention to the painstaking and thorough labors of Conrad by which it was proved that *the abolition of future trading did not have the effects on agriculture which were expected*, namely:

1. *Price fluctuations since the cessation of future trading have not decreased. In Vienna, where they have future trading, the price fluctuations are smaller than in Germany.*

2. In the absence of adequate Arbitrage transactions, which depend for their existence on future trading, and lacking any definite price quotations, *the price of grain was depressed below the level of the world price.* For example, wheat in Germany was 23 marks per ton higher in 1898 than in 1897; in Austria, 26 marks higher. Compared with the year 1896, wheat was 40 marks higher in Germany; 49 marks higher in Paris; 78 marks higher in Vienna. *Prior to this time the wheat price had been lower in Vienna than in Berlin. But since the prohibition of future trading the price level in Berlin has fallen below that in Vienna.*

* * * 4. The domestic grain trade has been completely disorganized by the prohibition of future trading, so that capital seeking investments in grain is no longer available in any volume, and therefore the tendency of the market is bearish. * * *

Further, the fact must be recognized that future trading makes it possible for the market to receive a big supply without smashing the price, and to meet a powerful demand without any serious price fluctuations, just because of the large volume of trading

which gives such a place the stamp of a world market place. But if no future trading market is evolved in a place and if the Bourse is limited to a mere local market, then a big supply must have serious influence on the price. Evidently commerce in those articles which come to market in large volume requires different ways and means of marketing from those commodities which are of limited quantities; therefore the natural evolution of business has developed future trading for certain articles, as even the German Bourse; I recall the one at Hamburg for coffee—forced to open there in order not to lose the business to Antwerp and Havre.

* * * To abolish future trading on these grounds—this crowning work of commercial life in modern times—would be like putting out all the fires of a country because by fire often very serious and costly conflagrations have occurred. In the age of world trade and world politics which involves a big balance of trade, it is indispensable to have an Exchange powerful and fully functioning, which is not hampered with unnecessary regulations, just as it is necessary for the army to have cannon and machine guns, although great victories have been won in olden times with plain pieces of ordnance and guns and stone castles. Every age requires its own means and such means as have been developed in the natural course of evolution.”

EXTRACTS FROM

TEN YEARS REGULATION OF THE STOCK EXCHANGE IN GERMANY.

By Prof. Henry C. Emery, Professor of Political Economy in Yale College.

“It must be admitted that the German law has proved a double failure. It has also been a fiasco so far as accomplishing its purpose is concerned; and it has produced evil results that were not intended. * * *

The real and supposed evils of speculation may be summed up under three heads:

(1.) The manipulation of prices (in the case of commodities) to the detriment of the consumer or producer. Sometimes it is the dread of corners and the extortion practiced against the consumer which calls out the criticism. More often, however, the criticism comes from the producing interests who claim that the prices received for their commodities are reduced by the supposedly nefarious practices of the short-sellers. * * *

* * * The evils of manipulation are enormously exaggerated. It would be idle to deny that there is any such thing as 'rigging the market,' but it very seldom lasts long enough to injure the farmer or the consumer. The speculators may be hurt by the tricks of their rivals, and the millers or spinners sometimes growl because of the tactics of the dealers in the wheat or cotton markets, but these are interests which know pretty well how to protect themselves. *Certainly no reasonable argument can be made for the claim that speculation reduces prices to the producer. On the contrary, the exact opposite is the case since it reduces greatly the margin between the farm price and the price of the central market.* This however, is not the place for a discussion of the beneficial effects of speculation. It is only necessary to indicate in passing that the first class of evils is largely imaginary and calls for no interference to protect an innocent public."

EXTRACT FROM

THE GRAIN TRADE IN PRACTICE.

By Otto Jöhlinger, Editor The Berlin Tageblattes. Berlin 1917. 2d Edition, enlarged. Translation ("Die Praxis des Getreidegeschäftes"). Pages 12-13, 297-298.

* * * INTRODUCTORY.

Hand in hand with the extension of the grain trade into world markets went also a tendency towards uniformity in price-movement, which was promoted by the development of the market news service. While form-

erly the prices in separate provinces and countries were quite different, and price fluctuations were large, today, *thanks to speculation, the time-differences in price and the place-differences in price are leveled down. As a consequence the fluctuations in price are much smaller than formerly*, and between the separate markets of the world as a rule only that price difference exists which represents differences in quality of grain, and transportation costs, tariffs, etc.

* * * SCOPE AND PURPOSE OF FUTURE TRADING.

The circle of interests among grain dealers is very large, and future trading affords a means of reflecting every shade of opinion concerning supply and demand. Hence it is particularly adapted to serving its one great end—insurance against loss by price changes. * * *

Examples of the necessity of future trading in grain may be multiplied, and they show that it is indispensable. *Indeed, they show that it was future trading that finally put the grain trade on a safe basis and removed from it its former speculative character."*

EXTRACTS FROM

THE MOVEMENT OF WHEAT PRICES AND THEIR CAUSES.

By Louis Perlmann. Munich and Leipsic 1914. Translation ("Die Bewegung der Weizenpreisen und ihre Ursachen"). Pages 53-55.

(The So-called Patten Corner, May 1909.)

"The supply (of wheat) at the beginning of the crop year 1908-09 was not much smaller than the 1907-08 supply, and the United States Visible was, in January, 1909, not only greater than in the previous year but also greater than that in 1907 in spite of the bumper crop of 1906. In the face of these statistics the newspapers were unanimous in their opinion of a "Patten Corner" which in January, 1909, was taking a more definite form. * * *

However, it is not merely these statistics of short stocks on farms and with the trade that shows the situation, but also the complete lack of supplies in the hands of the millers. According to many estimates the decrease in these supplies was just as great as in the case of the farmers and the trade, so that there was an actual deficit

of about 7,000,000 tons compared with the usual stock on hand at the beginning of the crop year.

But how was it possible that only one man foresaw this condition? This cannot be exactly accounted for. Probably it rests on the fact that the ratio between Visible supply and total Stocks is not always the same, and that this ratio early in the year 1909 was unusually out of line with average conditions. Everybody was looking only at the statistics of Visible supply, while Patten took into consideration underlying market conditions.

* * * The history of international corners teaches many things. * * * These corners were not artificial price bulges; they were not carried out by artificial control of the market; they were, on the contrary, based on keen forecasts of the actual future market conditions.

* * * Looking back over the past we must say: since a corner is extremely difficult when based on speculation in futures, and is much more easily carried through when based on cash grain, it has come about that speculation in cash grain has grown less and less on the Grain Exchanges. But it seems also quite probable, considering the enormous amount of grain produced and the development of commerce, that a corner, aiming to influence prices by controlling a large amount of grain,—or even aiming to dominate the market with the help of vast sums of capital—can no longer be effected successfully. Every attempt of this kind, and there have been many, has been a failure. * * *

EXTRACTS FROM

ORGANIZED PRODUCE MARKETS.

By John George Smith, M. A., Assistant Professor and Sub-Dean of the Faculty of Commerce, University of Birmingham, England. Published by Longmans, Green & Co., London, 1922. Pp. 96-145.

“CHAPTER VII.

THE WORK OF THE EXPERT SPECULATOR.

Expert risk taking, or professional speculation, the existence of which is necessary for successful hedging on

the part of genuine traders in the organized produce markets, is a comparatively recent development, owing its growth to the new economic conditions of the last half century. * * * It is in connection with these fluctuations that the new class of speculator originated; and the service it renders to society is that of bearing risks incident to changes in value, in other words, trading risks. * * * The wheat market has ceased to be local. It has become a world market. * * *

Fluctuations in price are, therefore, no longer dependent on local scarcity or abundance, but on world-wide connections and distant conditions which no merchant, however well he knows his own local market, can study sufficiently to justify him assuming the new speculative risks caused thereby. * * * Thus, speculation has become the business of a special group and the speculators, instead of seeking their own markets and moving their own goods, are a new class distinct from producers and merchants. * * * From the point of view of the genuine dealer it is that group in his market which assumes the main risk of changes in value of the produce as it passes from producer to consumer. It is a kind of commercial scouting party sent ahead to discover and report changes in value, and thus to direct trade into those channels along which the greatest efficiency requires it to run.

It has sometimes been advocated by those who wish to curtail what they consider to be the gambling element on the exchanges that dealing in futures should take place only in connection with hedging transactions, and that speculation unconnected with the protection of actual transactions, but merely with the object of obtaining profits from price fluctuations, should be prohibited. This is hardly practicable, and, even if it were, it would so narrow and cripple the market for futures as to destroy its efficiency for hedging purposes. Apart from the difficulty of determining the meaning of orders from outside markets, and much hedging is done in distant markets, it would be impossible, even in the case of contracts concluded within a single market, to ascertain whether the buyer or seller, or both, were hedging or speculating.

The bear speculator is one of the strongest factors in steadying price movements, and in obviating extreme fluctuations. It is not that short sellers actually determine prices. All they do is simply, by the act of selling, to

*express their judgment as to what prices will be in the future. If they are mistaken, they pay the penalty for their errors of judgment, by having to enter the market and buy at higher prices. Most people are unduly optimistic; and the higher the price goes the more elated they become. The presence of short sellers resisting this tendency to excessive rise is very salutary; for it makes an excessive rise extremely expensive. At the same time, when the drop takes place, short sellers, to realize their profits, must become buyers in order to cover. In this way, an excessive drop in price is likewise avoided. Short-selling, therefore, does not unduly depress prices as is often asserted; but it is, instead, a very powerful agent in steadying them. Over and over again prices are sustained or are put up at the expense of the shorts, who often, when a fall really occurs, hasten to cover before the drop becomes too great, only to succeed in driving the price up to and beyond its former level. Short-selling is thus a beneficial factor in steadying prices; and it is by its means that the discounting of serious and unfavorable events does not take the form of a series of sudden catastrophes, but, instead, is spread out over a reasonably long period of time, permitting the real holder of produce to observe what is happening and giving him time to limit his loss if he is caught on the wrong side of the market. From the constant contests of short-sellers with the bulls a much truer level of prices is evolved than could otherwise ensue. To quote the Report of Governor Hughes's Committee on Speculation in Securities and Commodities, 'No other means of restraining unwarranted marking up and down of prices has been suggested' anywhere; for the bulls take care of the interests of the farmer and are always looking for an opportunity to send prices up; while the bears represent the consumer, always on the watch to buy at the lowest price possible. * * **

The so-called 'fictitious' wheat or cotton of the short-seller cannot possibly affect the market to the disadvantage of producer or consumer; for the bear must always cover his sales, and in the end support the market by buying. Moreover, without short-selling, arbitrage transactions would be impossible, and in this way again, the beneficent work of the expert speculator would be gravely hindered.

Summing up, then, the services rendered by the class of expert speculators, at least seven may be distinguished as a paramount importance—

(1) By standing ready always to buy or to sell, it provides a continuous market with all the advantages resulting therefrom to both producer and consumer.

(2) By its watchfulness and its use of both official and other information it discounts the future, prevents panics, and spreads over a longer time the consequences of unexpected news, either good or bad.

(3) It regulates the rate at which the crop is consumed; and it helps by its action to reduce the cost of 'carrying' produce.

(4) By arbitrage transactions it levels prices between different markets, thus ensuring that produce shall find its way to where it is required.

(5) It steadies prices through the constant contest between bulls and bears.

(6) It hastens what would otherwise be tedious by smoothing difficulties in the way of necessary movements of produce. It is a creator of what the theoretical economist calls 'time utility.'

(7) Most important of all, it is always ready to supply the other party required in a hedging transaction, whereby, contrary to other forms of insurance in which the risk is jointly shared by several classes, it concentrates upon itself all the main risks of changes in value, and incidentally renders it easier for bankers to finance the movements of produce at every stage from farmer to consumer.

CHAPTER IX.

SOME EVILS AND ABUSES OF SPECULATION.

One of the chief services rendered by expert speculation is the lessening of fluctuations, and the establishment of prices which correspond to the actual conditions of supply and demand all the world over.
* * *

So-called excessive speculation on the produce exchanges may be nothing more than a sign of exceptional activity in general trade; but the fact that dealings are in excess of the average may point to a successful resistance to an attempt at manipulation by the saner elements in the market. It is not always correct, therefore, to ascribe to manipulation every sudden increase in dealings for which no reason can be immediately assigned. * * *

Probably no form of manipulation calls forth more condemnation from the general public than the 'corner.' * * *

Corners are not necessarily a result of futures dealing. They are in reality more common in transactions outside the exchanges than within them. Moreover, in the case of wheat and cotton the fact that, at certain periods of the year, only small amounts are available would still render cornering possible apart from any contracts for future delivery. It may well be doubted whether the existing risk of occasional or partial corners on the exchanges is greater than an actual monopoly of wheat under conditions in which contracts for future delivery would not be possible. * * *

CHAPTER X.

THE INFLUENCE OF SPECULATION UPON PRICES.

Reasons have already been given in support of the assertion that short-selling steadies prices, and that active legitimate speculation, by concentrating risks on experts, tends to narrow the difference between the price paid by the consumer and that received by the producer.

It is proposed now to discuss in greater detail the views of farmers, statisticians, and others, on these points, and to examine in a general way the manner in which speculation influences the prices of those two commodities, cotton and wheat, in which it is most widely employed, and in which it can work out its effects with the smallest interference from outside causes.

It is often asserted that the prices fixed in the speculative markets are unreal because they are determined 'regardless of the law of supply and demand.' This statement probably means nothing more than that the price is not in accordance with some preconceived idea of what it ought to be. * * *

The fact is that prices in the organized markets are determined by the existing supply and demand, but that the existing supply and demand, effective supply and demand, are both speculative. They are dependent on conditions in other markets, and on judgments concerning the future. Hence, future supply and demand, by their influence over present speculative supply and demand, affect prices; but this is the only way in which it is their power to do so.

The speculative demand and speculative supply find expression in offers to buy and to sell, and are, therefore, quite as genuine as ordinary demand and supply. * * * The speculator deals in estimates of future values. This is where the class of critics already referred to goes wrong. They fail to recognize that one main service of speculation consists in the influence it exercises over the determination of prices throughout a range of time in the future. It is not the present price so much as the future price over which it seeks control.

About the year 1894 and 1895, when prices were considerably depressed, the question of the influence of the active operation of a market in futures was widely discussed in England, America and the Continent. Anti-option bills were promoted in more than one American State; the so-called Exchanges Act was passed in 1896, in Germany, to regulate speculation on the exchanges there; and a committee of the section of *Economic Science and Statistics of the British Association* reported in 1900 on the effects of dealings in futures upon prices, with special reference to wheat. The particular point then under discussion was the assertion that futures tended to depress prices. This was a natural supposition in view of the prevailing low prices at that time, but the exactly opposite opinion has been maintained in times of high and rising prices, with as little justification in the one case as in the other.

That speculative sellers do not control the market is further borne out by the fact that prices of wheat and cotton rise and fall quite independently of the amount of dealings in futures. If it were true that the influence of these transactions is, on the whole, to depress prices, the greater their volume the lower the price ought to be. It is not easy, or even possible, to get complete figures from all the exchanges in order actually to test the connection, if any, between volume of dealings and price. Moreover, the practice of buying in one market and hedging in another may render the figures taken from a single market not altogether reliable. Yet the fact that there is no correspondence of the kind required in such figures as are available affords sufficient reason for concluding that such a connection does not exist.

There are occasions when short-selling has temporary success in depressing prices, but the cause is then invariably impulsive action on the part of the majority of

the speculators for which no reason can be assigned; and it is independent of the existence of any intrinsic good or evil in short-selling itself. If two or three dealers of known ability and financial strength continuously sell wheat when the general indications point to a rise in price they may succeed in bringing about a fall; for the other speculators in the market may be frightened and may lose their self-confidence, fearing the wisdom and strength of these operators rather than trusting in the indications and in the predictions arrived at by themselves. This is an instance of manipulation by means of a scare; but if the short-sellers are making a mistake the penalty they will be called on to pay will be immense. If, on the other hand, they are correct in anticipating an unexpectedly great supply they will reap a large reward for their superior economic foresight in putting the price where it ought to have been. * * *

It would seem that, at the time the view prevailed that short-selling depressed prices, the main argument of its upholders was that other causes seemed inadequate to produce the low prices then experienced. Further investigation, however, has shown that in the particular cases of wheat and cotton there were additional causes depressing prices which were overlooked at the moment. Yet in one way it may be true that the operation of a future market can depress the general price-level of the produce bought and sold in it, for the cost of handling may be so reduced by the perfection of organization in the market that the price may be lowered to the consumer without a corresponding reduction of price paid to the producer. It must be admitted that in this case the tendency to deprive the producer of his increased proportionate share of the total price paid by the consumer might be one he could not easily resist; *but statistics given in the British Association report do not lend support to the view that the growth of futures markets in wheat has resulted in a remuneration to the farmer less in proportion than formerly.* * * *

Another change in price phenomena directly traceable to speculation is the gentler gradation of the fluctuations. Only second in importance to the fact of the fluctuations themselves and their extent is the question whether the extreme points are reached suddenly or by easy stages. A moment's reflection at once shows that

a speculative system affords the most advantageous means by which this desirable end of easy gradations can be attained. There are always some persons in the market ready to buy as soon as prices begin to fall, and others ready to sell the moment prices begin to rise. Thus, a sudden large change in price is very rare. * * * This development is of great practical benefit, because the public thereby gets early warning of a change in values, and the smaller holders of produce are enabled to unload their stocks, if the market is falling, without the serious loss that they would incur if the price jumped at once to its lowest extreme, while the small purchasers are enabled to buy their supplies before the price reaches its uppermost limit; but the value even to the larger merchants, producers, and consumers, of a graduated price movement is too obvious to require discussion. * * *

Speculation in the organized markets contributes to the regulation of consumption of produce, both in time and in place. Rise in price is the immediate consequence, as already seen, of a conviction on the part of experts that supplies are being too rapidly consumed. In this way the necessary diminution is brought about in the rate of consumption, and the falling off is accurately adjusted to the needs of the case. Similarly, arbitrage dealings ensure the transport of produce, from place to place, in accordance with the requirements of every district. Scarcity in one place, indicated by a rise in price, draws supplies from other places where prices are lower and demand less pressing. Hence, speculation exercises a directive influence in distribution, and thereby, with its control of markets and prices, it reacts on production and consumption, and not infrequently modifies the nature of new developments in industry and in commerce among the leading nations of the world."

EXTRACTS FROM

SPECULATION IN THE STOCK AND PRODUCE EXCHANGES OF
THE UNITED STATES.

By Henry Crosby Emery, Ph. D., Professor of Political
Economy in Yale College.

No. 2 of Vol. VII of Studies in History, Economics and
Public Law, Edited by the Faculty of Political Science
of Columbia University in the City of New York.

“In the first place, it is desirable to dispose of a more or less prevalent idea that speculative prices are determined ‘regardless of the law of demand and supply.’ Such an idea is based on a complete misconception of the nature of value. The more free the competition between buyers and sellers, the more minutely is price regulated by demand and supply, and nowhere is competition more free than on the exchange. (p. 113)

Prices on the exchanges, however, are (and must be) determined by the existing demand and supply. But the existing demand and supply are both speculative, and depend for their strength on the conditions in other markets and on the expected conditions of the future. It is in this way that distant and future demand and supply affect prices, by affecting the speculative demand and supply here and now, and it is only in so far as they do determine the speculative market of the moment that they have any influence on price.

The speculative demand and supply are just as real as any other, and are expressed in genuine offers to buy and sell goods. (pp. 114-5)

* * * It is customary to attribute any price which is unfavorable to a particular class to the machinations of speculators. In this country speculation is charged with the responsibility for a large part of the fall in prices of agricultural products since the complete adoption of speculative methods a quarter of a century ago. Its tendency is supposed to be always towards a depression of price. Under other circumstances, however, it is blamed for always enhancing prices above the ‘natural’ rate. (p. 118)

This question as to the effect of speculation in depressing prices, which has been the chief argument of the anti-optionists in Congress, has been treated somewhat fully by the writer in another place, and calls for only a brief summary here. The familiar argument is, that short selling is a selling of products that do not exist, in addition to those that do, and so furnishes a corresponding increase of supply, which necessarily depresses prices; and then figures representing enormous sales are brought forward as statistical proof. These sales, however, are also purchases, and the question of their amount is of no importance. They represent a speculative demand as well as a speculative supply, and the real question is whether the speculative forces on the short side are stronger than those on the long side of the market, and whether the speculative supply or demand is warranted by actual conditions. (p. 119)

A comparison of the degree of depression with the amount of future sales shows that increased speculation has always accompanied higher prices.
* * *

What then is the effect of speculation on prices? Primarily, as has been shown, it acts to concentrate in a single market all the factors influencing prices. In this way a single price is fixed for the whole world. By means of arbitrage transactions former differences of price in different markets have been leveled. Of this there can be no doubt. The same should be true in regard to differences of time as well as of place. Since a great change in either the demand or supply of any commodity is less unexpected, it has far less influence on price, when it finally arrives, than it would have under a non-speculative system. (p. 120)

Perhaps the most potent influence in preventing wide fluctuations is the much maligned short-seller. It is he who keeps prices down by his short sales, and then keeps them strong by his covering purchases. This is especially true in the case of inflation followed by panic. If it were not for strong short selling when the market becomes inflated, prices might rise to almost any extent before the final crash. Now the rise tends to be checked by the efforts of shrewd operators to take advantage of the

inflation. On the other hand, when prices begin to tumble, they are kept from going as low as they otherwise would by the purchases which the shorts have to make to cover their contracts. *Thus prices at both ends of a panic are less extreme than they would be without short selling.* (p. 121)

There is one important change in price phenomena which may be traced directly to speculation as such, because no other cause could be equally influential in this direction. This change is not the greater stability of prices, but the greater graduation in price fluctuations. Even if it were to be admitted (for the sake of argument) that prices in the long run show as wide fluctuations as formerly, it is important to notice whether or not these extreme points are registered suddenly or by steady gradations. It needs little more than the mere statement to show the advantage of a speculative system in this matter. There are always some shorts ready to buy in as prices first fall, and some bulls ready to sell out as prices first rise, and these forces are very effective in graduating prices. *So perfectly does the system work that a sudden change in price, of any importance, is very rare. The fact is so apparent from a glance at the daily market news as to render statistical illustration unnecessary. This is almost entirely the work of speculation.* (p. 129.)

* * * Speculation, then, tends to equalize consumption over a long period by causing economy in anticipation of a shortage, and free use in anticipation of bountiful crops. (p. 145.)

The tendency of speculation is to lessen market fluctuations and to establish prices which correspond to actual conditions of demand and supply in all places. * * * Manipulation, however, is not a mysterious process, but rests on intelligible economic laws. Confining the discussion now to the market for produce, it may be said that a speculator can influence price in only two ways. He must either buy or sell the commodity himself, or he must persuade others to buy or sell. (p. 171.)

But the short-seller has already exerted his influence by his sales. If he wishes the price to fall further, he must still continue to sell at constantly

lower prices, or must start a selling movement among others.

It is true, however, that with sufficient capital a speculator may be able to bring about such a result. He may at times sell a commodity in such enormous quantities as to reduce the price. The question is whether he will be likely to attempt it. * * * Nevertheless it sometimes may occur that a big operator, or group of operators, temporarily succeed in putting the market down and in making the covering purchases so quietly and skillfully that the price is not materially raised. The mistake is in thinking that a successful operation of this kind can be easily or frequently accomplished. (p. 172.)

Indeed it may be doubted if such an operation can ever be successful without the favor of luck, such as the appearance of unexpected crop conditions, to support the manipulator at the end. * * * Speculators are equally ready to profit from a rising or a falling market. They know that in the end the conditions of actual demand and supply determine the price, and are not induced to forego acting on their opinions because of large transactions on the other side. A price movement may prove to be incorrect, because the speculative judgment is fallible, but such a movement must, in the main, represent the real market opinion on the condition of demand and supply.

A particular form of manipulation, which has excited far more adverse comment than, from the economic point of view, it deserves, is the 'corner.' (p. 173.)

At the same time the speculative corner is temporary and, so to speak, incorporeal. In the speculative market it is not wheat that is cornered, but 'September wheat' or 'May wheat.' It is necessary only to control the supply till the short-contracts mature. *Consequently the price remains high only for the last few days of the delivery month, while in other markets the price is little affected.* It has already been noted that during the September wheat corner in Chicago in 1888, the New York price rose only a few cents. *The consumer, then, is not perceptibly injured.* The only direct loser is the speculator, but indirectly trade is temporarily disarranged by the abnormal condition of the market.

A successful corner is of very rare occurrence. Most attempts in this direction have miserably failed. Furthermore, such attempts are becoming more and more infrequent, and success more difficult. It is a common saying in both the grain and cotton markets that the corner is a thing of the past. (p. 174.)

It may be said that, if big manipulations are seldom successful, there is a countless succession of small movements up or down due solely to speculative conditions. This is true enough. *In a sense all speculation is manipulation. There is always more or less effort to affect prices by purchases or sales, but the equilibrium of all these forces registers the opinion of the market as a whole.*" (p. 176.)

EXTRACTS FROM

SPECULATION AND THE CHICAGO BOARD OF TRADE.

By James E. Boyle, Ph.D., Extension Professor of Rural Economy, College of Agriculture, Cornell University, New York. The Macmillan Company, 1920.

"The demand side is the sensitive side of the market, showing the consumer's ultimate force in directing what shall be produced by deciding what shall be consumed. Applying this test of supply and demand to the Board of Trade wheat prices for the ten normal years, 1905-1914, we find that *the daily prices do fluctuate in accordance with supply and demand factors*. The figures on which this conclusion is based are given in Appendix 2 and 3.

It is fair to conclude, therefore, that the fundamental economic functions of a market are performed by the Board of Trade of the City of Chicago. (p. 8.)

Does the future price control the cash price? Some experts on the grain trade claim that it does. And since the future price is made in the pit, largely under speculative trading,—the conclusion is also reached that the cash price is a mere football of speculation. It had already been stated in Chapter I that cash price reflects supply and demand condi-

tions. It may now be stated at this point, that *future price does not determine cash price.* (pp. 59, 60)

The conclusion seems warranted that neither future nor cash price has a dominating influence, permanently, over the other, but that both are merely effects of supply and demand causes. They are, in short, effects of the same underlying causes. (pp. 61-2)

Speculation and Price Fluctuations.—Men speculate because prices fluctuate. And if all the speculators in the world were dead, prices would still fluctuate. Yet how common is the belief that speculation is the cause of price fluctuation. This is indeed a strange confusing of cause and effect. (p. 120)

It seems fair to conclude, therefore, that *speculation in grain on the organized exchanges lessens price fluctuations.* (p. 124)

Some twenty-five years ago, at a large and representative meeting of farmers a resolution was passed condemning future trading in wheat on the grounds that future trading lowered the price of wheat. Three weeks after this meeting, 500 members of the National Association of American Millers met in convention at Minneapolis and passed a resolution condemning future trading on the grounds that it raised the price of wheat. Apparently self-interest colored the views of both these groups. The truth lies halfway between these extreme views, namely, *future trading (i. e., free, open, competitive speculation) registers that price where meet in temporary equilibrium the competing buyers and sellers, expressing the competing forces of supply and demand.* (p. 125)

An examination of these market fluctuations, and the reasons given therefor by the experienced market reporters, tend to confirm the statement *that the fluctuations are not artificial, but do reflect supply and demand.* (p. 127)

The underlying idea of manipulation is the deliberate and conscious influencing of price through dissimulation. A vigorous campaign of advertising may bear or bull a stock or a grain. Is this advertising manipulation? Not so long as it is free from deception and fraud. There must be some de-

ceit. Influencing the grain market by spreading false crop reports (easily done 50 years ago) is manipulation, and is of course forbidden by Board of Trade rules. Influencing the grain market by spreading true reports of crop damage is not manipulation. (p. 152)

Prices are stabilized near the supply and demand level. Wider swings of the market are greatly lessened in range. In place of the wide swings, there are many minor fluctuations reflecting very sensitively the pressure of changing supply and demand. * * * *Speculation does not fix prices, but registers prices.* The speculator—who names prices—is working under the laws of supply and demand—or he ceases to be a speculator and is eliminated from the market. The law of the survival of the fittest obtains in the pit. (pp. 179-180)

The pit is one market which is open to an unlimited number of traders any hour of any day, by the simple process of forwarding their orders to their brokers. *There is little room for doubt that should the organized grain exchanges be abolished (and particularly future trading) the grain trade would very rapidly be centralized in the hand of a few powerful houses. They alone would be the buyers. They would declare the margins on which the farmers' grain would be handled, as indeed they once did before the Exchanges were able to curb them.* * * * *But the speculators in the future market, numbered by the tens of thousands, * * * are too widely scattered and too independent to be controlled—so long as the market remains free and open to them.* (p. 181)

The trading on the floor of an organized exchange is, in letter and in spirit, *a great auction*, open to the whole world, where buyers and sellers in nearly equal numbers, make their bids and offers. * * * The one great preventive of monopoly in the grain trade is the organized exchange, with its rules of self-government actually made by the majority of small traders." (p. 182)

EXTRACTS FROM
OUTLINES OF ECONOMICS.

By Richard T. Ely, Professor of Political Economy in the University of Wisconsin, and Thomas S. Adams, Professor of Political Economy in the Sheffield Scientific School of Yale University. The Macmillan Company, 1919. Pp. 622-624.

“Speculation.—The modern marketing or distributive mechanism not only relieves the producer of a large part of the speculative risk which attends the transmission of raw material from the farm to the consumer, and calls public attention to this speculative element by collecting or concentrating it, but it is responsible also for a large amount of unnecessary speculation which many persons believe to be particularly injurious to the farmer. We are not here concerned with the general evils of speculation but with the prevalent belief that speculative dealing in futures tends to reduce prices. ‘What is generally urged is that the professional short seller, by his sales of fictitious wheat or cotton, creates a fictitious over-supply in the market, which is just as instrumental in depressing prices as would be an abnormally large supply of actual wheat thrown on the market by the farmer.’ This charge is frequently supplemented by the assertion that it requires less money in margins to ‘sell short’—or gamble on a fall in prices—than to ‘sell long’ in anticipation of a rise, and that, in consequence, the weight of the speculative dealing in farm products is exerted in the direction of lower prices.

This particular charge against speculation is confirmed neither by a priori reasoning nor by inductive analysis. Every ‘fictitious’ sale of wheat, to use that as an illustration, must be balanced by an equivalent ‘fictitious’ purchase. The ‘bear’ who sells October wheat in July, even though he may hope to depress the price of October ‘futures,’ exercises no harmful influence upon the actual July or ‘spot’ price, which is controlled by the demand for and supply of actual wheat; and when October comes, ‘the short seller of

July appears now as a buyer in order to cover his contracts, and if his trading has any effect on the market at all, it is to increase the demand, not the supply.'

It is very plain that the fictitious market may be artificially influenced by speculative deals, but as a general thing the fictitious market is ruled by the actual market, not vice versa; and the only influence exerted by gambling in futures upon 'spot' prices (with which alone the farmer is concerned) is a good influence. This influence arises out of the effect of future transactions in lessening price fluctuations and in modifying present use by anticipating future necessity. * * * In no market are influences of this kind more accurately detected or more quickly dissipated by competitive forces than on the produce and cotton exchanges.

Actual investigations of prices confirm the theoretical argument made above. The average prices of spot wheat in September, October and November—just after harvest, when the ordinary farmer is compelled to sell—have been nearer the average price for the entire year, since the speculative wheat market has become highly organized, than in the forties and fifties when wheat was sold like any other farm product. And there are reasons for the belief that speculation has not only equalized yearly fluctuations, but that the leveling has been up, not down, in the interest of the farmer who is compelled to sell after harvest, as opposed to the wealthier miller or trader who in the past carried over a supply for the lean months."

EXTRACTS FROM

THE MARKETING OF FARM PRODUCTS.

By L. D. H. Weld, Ph. D., Professor of Business Administration in Sheffield Scientific School, Yale University. Formerly Chief of Division of Agricultural Economics, University of Minnesota.

MacMillan, Publishers, New York, 1916.

“Corners—In spite of the great volume of trading that takes place, it happens, except in extremely rare instances, that when any given delivery month arrives, those who have sold short in the speculative market have enough actual wheat to fulfill their contracts, and those who have bought long are ready to take delivery of the actual grain. Of course it is possible that the buyers may have bought up more wheat than the shorts can find to deliver, in which case it is said that they have cornered the market. Enough unexpected grain usually shows up at the last minute to make such a corner impossible, but if the actual grain is not at hand, the shorts are ‘squeezed’ and have to buy from those to whom they have contracts by paying over to those who have cornered the market the difference between the price they contracted to sell for, and the price which the manipulators have brought about through their monopoly power. The possibility of cornering a market depends on the quantity of grain available for delivery and the extent to which the ‘bulls’ have been able to buy this up.

The possibility of corners is of course one of the weaknesses of the speculative system, but, as suggested before, successful ones are of extremely rare occurrence. There would be the same possibility of cornering the supply of actual wheat, if there were no system of future trading and the results would doubtless be more serious, because under the present system a corner affects seriously only the price of the future, and that for only a short time until the end of the delivery month. * * *

Normally, the price of wheat in the United States should increase between the fall of one year and the following spring and summer, owing to the cost of carrying in elevators. *Although the adjustment is never absolutely perfect, the results achieved through speculation are truly remarkable.* The following figures show the average monthly prices for the ten-year period 1901-10 of cash wheat at Chicago:

	Cents per bushel
July	93.1
August	92.1
September	92.7
October	92.3
November	91.1
December	93.3
January	91.2
February	93.5
March	92.8
April	92.3
May	95.6
June	95.7

From these figures it will be observed that the lowest average monthly price was 91.1 cents, and the highest, 95.7 cents, a total difference of only 4.6 cents. The prices do not increase evenly from month to month but it is indeed significant that the average prices of August, September, and October (months of heavy receipts in Chicago) were adjusted in such a way as to make it necessary for the price to be only 95.6 cents and 96.7 cents respectively in May and June. *The difference between the average September price and the average May price is only 2.9 cents—hardly enough to pay for carrying wheat in an elevator for nine months.* One interesting conclusion to be drawn from these figures is that a farmer would have obtained on the average 2.9 cents more per bushel if he had held his wheat each year until May instead of marketing it in September. This would not have been enough to pay for storage on the farm and to make up for shrinkage due to evaporation of moisture and imperfect storage facilities. *In other words, the farmer year in and year out obtains as much and more for his wheat by marketing in the fall as by holding until the following spring.* * * *

Speculation not only tends to level prices throughout the year, but it performs a most signal service in making price changes over short periods less abrupt. * * * The reasons for the relatively gradual fluctuations in the wheat and cotton markets, for example, are to be found in the tremendous pressure brought to bear on both sides of the market by speculators. The shorts, or bears, are always trying to depress the market; the longs, or bulls, are always trying to raise it. The unfortunate thing for either of these classes in realizing their desires is that sooner or later the short sellers have to become buyers, and the bulls, sellers. Speculative short sellers, for example, sell large quantities for future delivery, hoping to see the price go down; but the only way they can make any profit from a fall in price is to begin to cover, i. e., to buy again, and their purchases tend to obstruct a further decline and possibly to cause the price to begin to rise again. Professional speculators are content with extremely small profits per transaction. Just as soon as the price begins to fall, there are shorts who begin to buy; and on the other hand, just as soon as the price begins to rise, there are bulls who begin to sell in order to take their profits. In other words, just as soon as the price begins to move in either direction, even by eighths of a cent (in the case of wheat), there are strong counteracting forces which hinder and often completely obstruct the price movement. As a consequence, extreme fluctuations in the price of those commodities which are dealt in speculatively are exceedingly rare under normal conditions, and this leveling influence is of great value to those engaged in merchandising the commodities. *In this connection, the fallacy that short selling has the effect of generally depressing prices should be mentioned*, but this has been treated so conclusively in other places that a detailed discussion is not necessary. Suffice it to say that the pressure from the bull side is just as great as from the bear side (in fact there are likely to be more bulls than bears if anything), and that the bears tend to defeat their own purpose by having to become buyers, as explained above. *Objections to speculation based on this time-worn argument appear to be decreasing.* * * *

The professional speculator performs an important function, and to drive him out of business would be to

destroy the continuous market for hedging operations, to derange the highly delicate machinery for recording opinions of traders, to lessen the pressure on prices from both above and below, and to restrict the interplay and competition between markets. These effects would throw greater risks on the actual merchandisers, and force them to take out larger margins to cover these risks. It is also probable that there would be a greater amount of speculation in the commodities themselves and a greater chance of manipulation on the part of the powerful financial interests."

EXTRACTS FROM

PRINCIPLES OF ECONOMICS.

By F. W. Taussig, The Henry Lee Professor of Economics in Harvard University.

Macmillan Co., Publishers, New York, 1915. Vol. 1.

Pp. 159-161, 216.

*"The fundamental effect of speculation is to promote the establishment of the equilibrium of supply and demand. It tends to make daily market prices conform to the seasonal market price, and to make the seasonal market price such that the whole seasonal supply is disposed of. * * **

** * * There will be fluctuations in price, some ups and downs, some unexpected gains and losses,—'speculative' profits or losses. But the general effect of speculation is to lessen fluctuations, and promote the smooth course of exchange and consumption.*

This lessening of fluctuations is advantageous alike to the ultimate consumers, and to those manufacturers who in business parlance are often spoken of as the 'consumers' of a raw material. * * *

The good effect of speculation in this direction has been illustrated from the experiences of older days, when wide fluctuations in the price of food were common. Under modern conditions, with great areas of supply brought into competition by railways and steamships, abrupt changes in the supply of most

foodstuffs and raw materials are rare. * * * But under such conditions as existed under the limited geographical division of labor before the eighteenth century, great fluctuations were common. * * * We know very little of the details of what took place in these early days, and are prone to project into them ideas or conclusions based on our own experiences. But none the less it is probable that even in those times the influence of speculation was in the main to lessen fluctuations and promote the expedient rate of consumption. It is certain that this is its tendency under the modern conditions of wide markets, full information, active competition. * * *

Successful corners are rare. Usually those who attempt them underestimate the supply and overstrain their credit."

EXTRACTS FROM

ELEMENTARY PRINCIPLES OF ECONOMICS.

By Irving Fisher, Professor of Political Economy. Yale University. Macmillan Co., Publishers. New York 1913. Pages 338-343.

SPECULATION.

"We have spoken of the equalization of prices as between different places. We have next to consider equalization of prices as between different times. Corresponding to the tendency to the equalization of the prices of a given commodity between different places, that is, between the places where it is abundant and cheap and the places where it is scarce and dear, there exists a tendency to the equalization of the prices of a given commodity at different times. Moreover, the method of equalization of prices between times corresponds somewhat to the method of equalization of prices between different places. * * *

Just as the equalization of prices between places is largely due to the work of a special class of business men who engage in arbitrage transactions, so

the equalization of prices between different times is largely accomplished by a special class called speculators. * * *

Therefore speculation may do either good or harm. It does good when it reduces the inequality of prices at different times. It does harm when it aggravates this inequality. Fortunately, the interests of the speculator and the public are to a large extent identical. It is evident that when the speculator is correct in his prognostications, he will make a profit. His object is to make a profit when prices are rising, but he can do so only by mitigating the rise. Likewise his object is to make a profit when prices are falling, but he can do so only by mitigating the fall. His profits are, as it were, a reward paid him by the community for mitigating price changes. If he makes a mistake in either form of speculation, he suffers losses, and these losses may be regarded as a sort of penalty he suffers for aggravating the inequalities in prices. Since the interests of the speculator and of the public are thus parallel, there is a premium put on wise and beneficial speculation and a penalty on unwise and injurious speculation."

EXTRACTS FROM

PRINCIPLES OF ECONOMICS.

By Edwin R. W. Seligman, LL.D., McVickar Professor of Political Economy, Columbia University, Author of "The Economic Interpretation of History," etc. Longmans Green & Co., New York, 1905. Pages 363-365.

"The chief economic function of regular speculation consists in the assumption of risk and results in the equalization of price. * * *

It was to secure an escape from the risks of such oscillations that a special class arose which assumed this risk and by concentrated attention derived a profit from the price fluctuations. * * *

The first way in which risk is minimized for the ordinary business man and assumed by a regular speculative class is through the provision of a continuous open market. * * *

A natural and more recent outcome of this attempt to avoid risk is the practice of 'hedging' or 'covering' transactions. * * * Through the use of such wheat and cotton futures we thus have the paradoxical result that the business man often resorts to speculation in order to free his business from speculative influences.

The result of regular speculation, again, is to steady prices. * * * Speculation thus tends to equalize demand and supply, and by concentrating in the present the influences of the future it intensifies the normal factors and minimizes the market fluctuation. Speculation hence exerts a directive influence on price. A good example of this is afforded by the Gold Law during the civil war. The discount in greenbacks was mistakenly ascribed to the speculation on the gold exchange, and a law was enacted to prohibit all such transactions. As a result, the premium on gold jumped at once from 195 to 285, with wild fluctuations day by day, to be followed, after the hasty repeal of the law fifteen days later, by just as sudden a recession of the price."

EXTRACTS FROM

PRINCIPLES OF MARKETING.

By Paul Wesley Ivey, Ph. D., Professor of Marketing,
University of Nebraska.

The Ronald Press, Publishers, New York, 1921. Pp. 308-309.

*"Speculation and Price Fluctuations. * * **
Strange to say, speculation has been accused of causing wide price fluctuations, and hence has been thought to depress business. *The truth is that under normal conditions speculation stabilizes price, while lack of speculation permits an erratic market. * * **
Under normal conditions, with free and complete speculation, it is difficult for the market price to fluctuate widely because it is to the advantage of either longs or shorts to return it to its former position. *Speculation thus produces market equilibrium.*

A study of grain prices from 1899 to 1916 substantiates the position taken. It indicates that the price fluctuations in those grains traded in on the future market were far less marked than was the case with grains for which no future market existed. Only once during this period did wheat show a fluctuation of over 100 per cent, and only twice did oats exhibit a fluctuation of this amount, while barley showed such a fluctuation eight times. *During a period of 100 years, before future trading was inaugurated, price fluctuations were twice as great as during the period since that date.*"

EXTRACTS FROM

AGRICULTURAL COMMERCE—THE ORGANIZATION OF AMERICAN COMMERCE IN AGRICULTURAL COMMODITIES.

By Grover G. Huebner, Ph.D., Assistant Professor of Transportation and Commerce, Wharton School of Finance and Commerce, University of Pennsylvania.

D. Appleton & Co., Publishers, New York and London, 1915. Pp. 160-162.

"EFFECT OF SPECULATION ON SPOT PRICES.

There are widely varying views as to the effect of speculation upon the price of spot produce. *Cotton and grain growers not infrequently contend that it depresses the prices which they receive.* This view is based mainly on the belief that as spot and future prices largely fluctuate in harmony, the sale of futures has the same effect as a large increase in the supply of grain or cotton. *The sale of futures, whether as a short sale or otherwise, does not, however, have such a depressing effect.* In the first place every short sale means also a purchase at the time and 'consequently against the depressing influence of the short sale there is the uplifting influence of the purchase, and the effect of the transaction on prices is determined by the relative character of the buying and selling and not by the mere fact that a sale has been made.' Second, every future is a valid

and binding contract. Every short sale, therefore, before or at the time when the contract matures, requires a purchase either of grain or cotton or of another future to offset the one that was sold. Third, *'this popular misconception of short selling overlooks the extremely important fact that influential speculators seldom undertake deliberately to contest natural conditions at least for any length of time. Instead they frequently spend large sums of money in securing all possible information which may tend to influence prices. Instead of fighting natural conditions, the ordinary speculator is eager to ascertain correctly what the natural conditions are and what their probable influence will be, and then to shape his campaign in the market in accord with such information.'* * * * Fourth, as was pointed out in a previous chapter, when futures sell at an abnormal discount, as they sometimes do in the cotton trade, the spot prices of the large markets refuse to follow the price of futures and the cotton buyers are economically compelled to readjust the limits which determine the growers' prices. Fifth, *statistics as well as common trade knowledge indicate that in the years when the volume of future sales is greatest spot prices are usually higher than when speculation is at low ebb.*

Sixth, the present effect of speculation upon farmers' prices is not to be judged by comparison with assumed prices such as might be paid if all the abuses of speculation were abolished and all its advantages were retained, but by comparison with the prices which would probably be paid if there were no speculation whatever. The widespread use of the future markets for hedging purposes makes it clear that if the selling of futures were everywhere abolished, grain and cotton buyers would endeavor to protect their trade profits by paying the farmers relatively lower prices.

While there are farmers who believe that speculation depresses spot prices, so there are some flour millers and cotton spinners who are equally positive that it has the opposite effect. They usually have in mind the 'corners' which sometimes occur in the speculative markets. * * * It is only a temporary 'squeeze' which lasts until the operators who sold short for delivery in that month settle at a much advanced price. It is an evil mainly because of its disturbing effect upon outstanding hedges. The speculative corner should not be con-

fused with an actual corner of spot grain or cotton. Such a corner would have far-reaching effects, but the grain and cotton crops of the United States and of the world have become so vast there is little likelihood of such a calamity. * * *

Speculation affects central market prices in that it tends to establish a proper price level earlier than it would otherwise be established. It moreover tends to steady spot prices. This steadying effect is not to be confused with the fact that future prices have in recent years fluctuated more violently and more frequently than spot prices. Spot prices are steadied by speculation in that without the tendency of the exchanges to constantly discount future conditions and their unusual efforts to obtain accurate trade information, they would break much more sharply between the harvesting seasons. The speculative exchanges likewise, as was previously pointed out, facilitate the establishment and maintenance of a world's price for cotton and the leading cereals."

EXTRACTS FROM

MARKETING AGRICULTURAL PRODUCTS.

By Benjamin Horace Hibbard, Ph.D., Professor of Agricultural Economics in the University of Wisconsin.

D. Appleton & Co., Publishers, New York and London, 1921. Pp. 152-154.

"It has been shown repeatedly that fluctuations in prices before the development of organized speculation were not only as violent as, but usually more violent than, they have been since that development. * * *

*In the case of the wheat market, the records show fluctuations to have been greater before the time of exchanges than since. * * **

The second consideration is that of the fluctuations in the prices of products not sold for future delivery. Live stock comes to mind as the greatest example, and any one at all familiar with the market asks no statistical proof of the fact that fluctuations in the price of live stock are fully as violent as those in the grain trade.

The live stock fluctuations are deplorable, and some one may be to blame, but dealing in futures is not the explanation of the offense. Potatoes are as erratic in price as wheat could well be, or ever is. The same is true of wool and eggs. Mention should be made of barley, a cereal which until lately was not sold for future delivery. According to the critics of the future-trading system, barley should show a more stable record of prices than wheat or oats. On the contrary, it was much less stable.

Coming back to the logic of the case, we may say with safety that in an organized market speculation is two-sided, and whenever one side is overstimulated the tendency is strong, in fact virtually irresistible, for the other side to be so affected by the situation created as to come to the rescue. This does not mean that fluctuations may not progress to a very appreciable degree before being checked. On the contrary, speculators, being always apprehensive lest some influence should run away with the market and cause heavy losses, are likely to be, through their apprehension, the very cause of the danger feared. For example, a group of shorts, fearing a rise in the market, may bid a little high, and thereby alarm another group who will push prices still higher, until some calm bear starts the counter movement by offering so freely to sell as to start the price in the other direction. Thus, again, we come to the conclusion that so far as both facts and logic are concerned, there is a reason to believe that organized speculative markets exert a stabilizing influence on prices."

ORATION OF LYSIAS, ONE OF THE TEN ATTIC ORATORS
AGAINST THE GRAIN DEALERS.

(About 400 B. C.)

"1. Many have come to me, Judges, expressing surprise that I have entered an accusation in the Boulè against the corn dealers, and saying that you, even if you think them ever so guilty, nevertheless think that those who bring charges against them act as sycophants. Accordingly I first wish to show you why I was compelled to accuse them.

2. When the Prytanes reported them to the Boulè, feeling ran so high that some of the speakers said that without a trial they should be handed to the Eleven to be put to death. But I, thinking that it would be a terrible precedent for the Boulè to do this, rose and said that it seemed best to me to try the dealers by law, as I thought that if they had committed a capital crime you no less than we would decide justly, but if they had done nothing wrong they need not have died without a trial.

3. When the Boulè had agreed to this some tried to slander me, saying I made these speeches for the safety of the dealers. Before the Boulè, since the preliminary trial was before them, I made a practical defense. For while the rest were sitting still I got up and accused them, making it clear to all that I had not spoken in their behalf, but had been upholding the established laws.

4. I took up the matter on account of this, fearing the charges. And I think it base to stop until you have voted what you wish.

5. First stand up and tell me whether you are a metic? Yes. Are you a metic on condition of obeying the laws of the city or doing what you please? On condition of obeying. So you think to escape death if you transgress the laws of which the penalty is death? I do not. Tell me then whether you confess that you bought more than the fifty measures of corn which the law allows. I bought it, advised to do so by the officers.

6. If he can show, Judges, that there is a law which permits dealers to buy corn when ordered to do so by the officers, you must acquit them. If not, consign them to punishment. But we will show you the law which forbids any one in the city buying more than fifty measures of corn.

7. This, Judges, ought to end the accusation, since he admits that he bought corn which the law plainly forbids, and you have sworn to give judgment according to law. But that you may be convinced that they lied about the officers I must say something further about them.

8. Since they made the charges against them let us call the officers and question them. Four of them say they know nothing about the matter. Anytus says that last winter when corn was high and the dealers were outbidding and fighting against one another, he counseled

them to stop quarreling, thinking it was advantageous to you who buy from these that they should previously buy it as cheap as possible. For they can sell it not more than an abol dearer.

9. That he did not order them to buy the corn and store it up, but advised them not to fight with each other, I will prove by Anytus, and also that he said these words last year, and they have been proved guilty of engrossing corn this year.

10. You have heard that they did not buy the corn because they were advised to do so by the officers. And I think if they really are speaking the truth about the corn inspectors they will not be defending themselves, but accusing them. Ought they not to be punished for offences concerning which the law is expressly written—both those who do not obey and those who direct to do what is contrary to them?

11. But I do not think, Judges, that they will resort to this argument. Perhaps they will say, just as they did before the Boulè, that they did it out of good will to the city, that you might buy it as cheaply as possible. I will tell you the greatest and most evident proof they lied.

12. They ought, if they bought the corn for your benefit, to have sold it many days for the same price, until the supply ran out; but in truth they sold it at a drachma dearer, as if they were buying it up by the medinnus. I will prove this to you by witnesses.

13. I think it strange that when there is a tax to pay about which all men will know, they do not wish to do their share and plead poverty, but those offences for which the penalty is death, and in which it was for their interest to escape detection, they say they committed out of good will to you. You all know that it is the least fitting for them to make such a defence. For their interests and yours are entirely different. They gain most when some disaster has befallen the city and they sell the corn for a high price.

14. Thus when they see your misfortunes they are glad, so that they often hear of some before other people, and others they make up themselves; either the ships have been destroyed in the Pontus, or have been captured sailing by the Lacedemonians, or that the market is closed, or that the truces are about to be made void; and they have come to such a pitch of enmity (15) that

in these times they plot against you as though they were your enemies. When there chances to be the greatest need of corn they heap it up and refuse to sell, that we may not dispute about the price, but may think ourselves lucky if we manage to buy from them at any price whatever. So although there is peace we are besieged by these men.

16. Long ago the city came to have such an opinion of their evil doings and wickedness, that while for all the other trades you appointed clerks as inspectors, for this traffic alone you appointed corn inspectors; and from many of these you have taken heavy punishment, although they were citizens, because they were not able to stop these practices. Ought not, then, those doing this wrong to receive punishment at your hands when you have killed those not able to restrain it?

17. You ought to know that it is impossible to acquit them. For if you acquit those who confess to making a corner against the merchants you seem to plot against the merchants. If they made some other excuse no one would censure those acquitting them; for in such cases it is at your discretion to believe either way. But now if you set free those who confess that they have broken the law would you not seem to be doing a strange thing?

18. Remember, Judges, that you have already condemned many accused of this crime who brought forward witnesses, as you thought the assertions of the accusers more trustworthy. Would it not be strange if, judging those doing wrong, you were more desirous to take punishment from the guiltless?

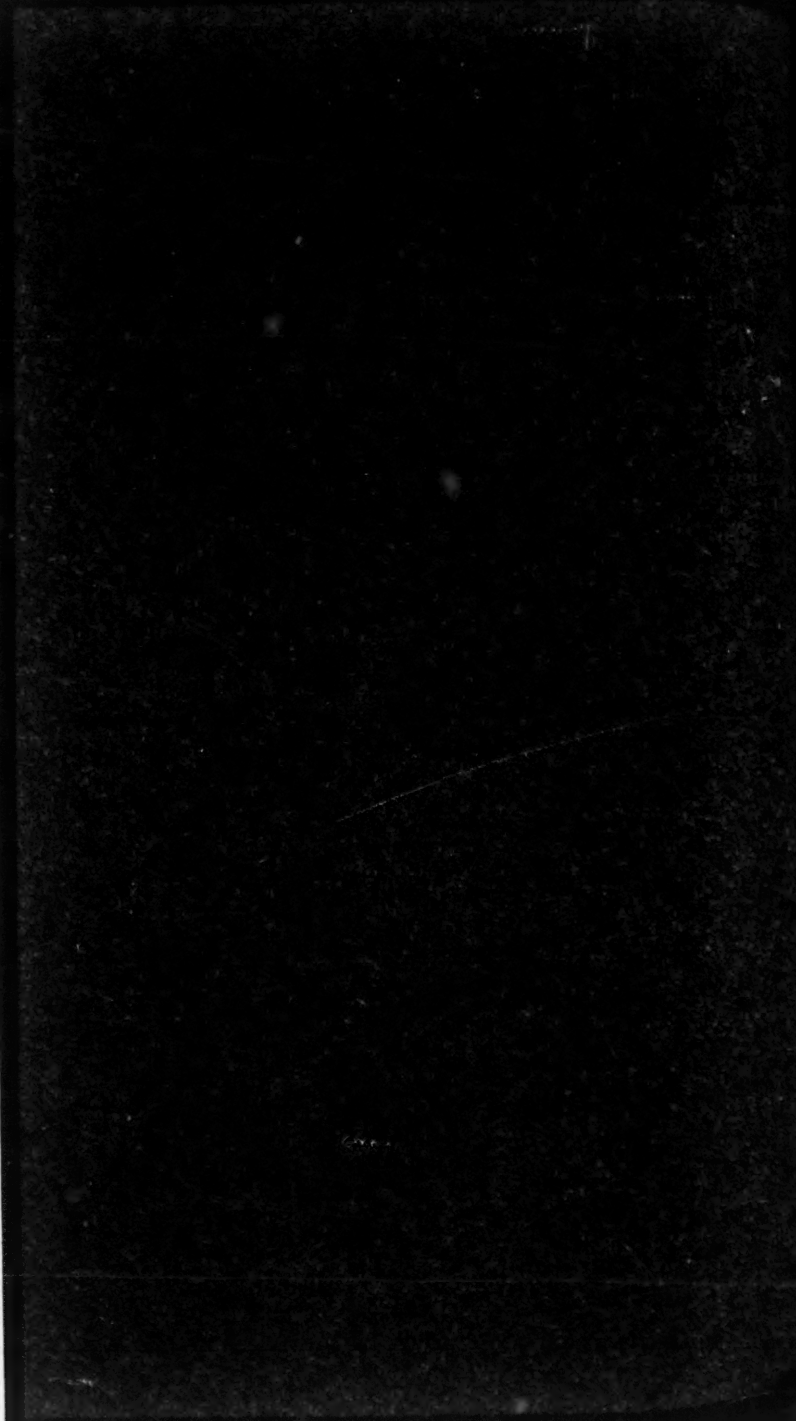
19. I think, Judges, that it is plain to all, that cases against these men are of the most general interest to those in the city, that they may learn that you have some mind about them; for they will think if you condemn them that they must be more careful in future, whereas if you acquit them you will have voted them every opportunity of doing what they wish.

20. It is necessary to punish them, Judges, not only on account of the crimes which have been committed, but as a precedent for those that will be. For in that case they will only be just endurable. Remember that many in this business have been tried for their life. And so great are their profits from it that they prefer to run in danger of their life every day than to stop getting unlawful gain from you.

21. If they beseech you and entreat you you could not justly pity them, but rather have compassion on the citizens who have been dying with hunger on account of their knavery, and the merchants against whom they combined. These you will rejoice and make more jealous if you take punishment on the dealers. But if not, what opinion do you think they will have when they learn that you let off the retail dealers who themselves confess to plotting against the merchants?

22. I do not think I need say more. About other criminals you must be informed by the accuser, but about the knavery of these men you know everything. If you condemn them you take punishment from them and make corn cheaper; if you acquit them you make it dearer."

From—Select Orations of Lysias. Literally translated by Edward Roth and Others. David McKay, Publisher, Philadelphia. Pages 9-13.



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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BOARD OF TRADE OF THE CITY OF CHICAGO,
John Hill, Jr., Reuben G. Chandler,
Adolph Kempner, Emil W. Wagner,
Alfred V. Booth, Edward L. Glaser and
Alonzo B. Lord, *Appellants*.

v.

CHARLES F. CLYNE, UNITED STATES AT-
torney, for the Northern District of Il-
linois; Henry C. Wallace, Secretary of
Agriculture of the United States, and
Arthur C. Lueder, United States Post-
master at Chicago, Ill., *Appellees*.

No. 701.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

I.

STATEMENT.

The fundamental question is, Shall the Chicago Board of Trade,¹ or the Congress of the United States under its power to regulate interstate and

¹ The Federal Trade Commission, on Sept. 15, 1920, submitted to the Congress a report entitled "The Grain Trade," made on the request, Feb. 7, 1917, of President Wilson, on the facts relating to production, owner, ship, manufacture, storage, and distribution of foodstuffs. In the report,

foreign commerce and to establish post-offices and post-roads, regulate the great "current of commerce" flowing between the producing-selling and the pur-

under the heading "Legal status of future trading" (p. 272), the term "gambling" is defined and described, with the statement that a discussion of the legal status of future trading "involves the consideration, among other questions, of what constitutes gambling." (Vol. V, "Future Trading Operations in Grain," report of Federal Trade Commission on the Grain Trade, Sept. 15, 1920.)

The Supreme Court of Illinois, the inferior Federal courts, and the Supreme Court of the United States have all frequently considered the gambling aspects of future trading.

In *Pickering v. Cease*, 79 Ill. 328, 330, the Supreme Court of Illinois said:

What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, or that any would have been delivered had demand been made. * * * Being in the nature of gambling transactions, the law will tolerate no such contracts.

In *Lyon v. Culbertson*, 83 Ill. 33, 38, the Supreme Court of Illinois said:

The fact that no wheat was offered or demanded, shows, we think, that neither party expected the delivery of any wheat, but, in case of default in keeping margins good, or even at the time for delivery, they only expected to settle the contract on the basis of differences, without either performing or offering to perform his part of the agreement; and if this was the agreement, it was only gaming on the price of wheat, and if such gambling transactions shall be permitted, it must eventually lead to what are called "corners," which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain, as well as the producer, and are pernicious and highly demoralizing to the trade. A contract, to be thus settled, is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is, in all but name, a gambling on the price of the commodity, and the change of names never changes the quality or nature of things.

In *Pearce v. Foot*, 113 Ill. 228, 235, 239, in holding that certain transactions violated section 130 of the Criminal Code which provided that "Whoever contracts to have or to give to himself or another the option to sell or buy at a future time any grain or other commodity," shall be subject to a fine or imprisonment, and "all constructs made in violation of this section shall be considered gambling contracts, and shall be void," the Supreme Court of Illinois said:

Although the statutes being considered are highly penal, there is no warrant for construing them with any unreasonable strictness.

chasing-consuming markets of the great bulk of substantially the world's supply of wheat, corn, oats, barley, rice, flax, and sorghum?

They ought rather to have a just, if not liberal, construction, to the end the legislative intention may be accomplished—to prohibit all dealings in options in grains or other commodities. Nothing is productive of more mischievous results. Considerable fortunes secured by a life of honest industry have been lost in a single venture in "options." The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the board of trade are of the utmost importance in commerce. Such contracts, whether for immediate or future delivery, are valid in law, and receive its sanction and all the support that can be given to them. It is only against unlawful "gambling contracts" the penalties of the law are denounced, and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished.

In *Cothran v. Ellis*, 125 Ill. 496, 501, the Supreme Court of Illinois said:

But leaving both sections of the statute cited entirely out of view, we are clearly of opinion that dealing in "futures" or "options," as they are commonly called, to be settled according to the fluctuations of the market, is void, by the common law, for, among other reasons, it is contrary to public policy. It is not only contrary to public policy, but it is a crime—a crime against the State, a crime against the general welfare and happiness of the people, a crime against religion and morality, and a crime against all legitimate trade and business. This species of gambling has become emphatically and pre-eminently the national sin. In its proportions and extent it is immeasurable. In its pernicious and ruinous consequences it is simply appalling. Clothed with respectability, and entrenched behind wealth and power, it submits to no restraint, and defies alike the laws of God and man. With despotic power it levies tribute upon all trades and professions. Its votaries and patrons are recruited from every class of society. Through its instrumentality the laws of supply and demand have been reversed, and the market is ruled by the amount of money its manipulators can bring to bear upon it. These considerations imperatively demand at the hands of the courts of the country a faithful and rigid enforcement of the laws which have been ordained for the suppression of this gigantic evil and blighting curse.

In *Schneider v. Turner*, 130 Ill. 28, 35, 39, the Supreme Court of Illinois held:

Still it is most earnestly insisted that notwithstanding the instrument sued on is, on its face, an option contract, and although it can not be changed into a mere offer by parol proof, yet it is not violative of section 130, by proper construction of that section. * * *

Preliminarily, the case should be cleared of the fogs which obscure the real issues.

The Grain Futures Act is not a taxing act. Decisions on the taxing power are without application. It is essentially an act to regulate commerce.

The Child Labor cases (*Hammer v. Dagenhart*, 247 U. S. 251; *Child Labor Tax case*, 259 U. S. 20) held that the laws were purely regulatory of produc-

The first question which suggests itself in considering the construction of this statute contended for by appellants is, if their construction is the true one, Why was the statute enacted at all? Nothing is more clearly and firmly established by the common law than that all gambling contracts are void. It is equally well settled that all contracts for the purchase and sale of property with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the difference between the contract and market prices, are mere wagers, or gambling contracts, and void. (3 Am. and Eng. Ency. of Law, p. 873, and cases cited in note 1; *Cothran v. Ellis et al*; 125 Ill. 496.) Long prior to the passage of this statute it had been repeatedly so decided by this court. Therefore the section, as construed by counsel for appellants, serves no purpose whatever. If their construction is correct, when the legislature declared that all contracts made in violation of section 130 should be considered gambling contracts, and void, it only condemned contracts which were already gambling contracts, and void. Certainly more than this was intended.

In *Soby v. People*, 134 Ill. 66, 71, 72, the Supreme Court of Illinois said:

It is manifest that the object of the statute was to suppress and prevent gambling in grain and other commodities; but so great was the difficulty of establishing the unlawful intent of the parties making illegal contracts, and so many were the shifts and devices resorted to for the purpose of concealing the true character of the gambling transactions entered into, that the statute was found to be ineffectual to accomplish the purpose for which it was enacted. It is a matter of common notoriety that, notwithstanding the highly penal character of the statute of 1874, the evil it was aimed at continued to increase with wonderful rapidity throughout the State, and until in almost every city or town of any considerable importance, commission houses, offices, or agencies were established, in which the great bulk of the business transacted was the making of contracts which, while legitimate upon their face, were in fact mere gambling transactions.

tion and never designed to regulate commerce or raise revenue. As child labor was performed before any sale or transportation commenced, it bore no relation to interstate commerce; hence such laws covered subjects of regulation which belonged wholly to the States and could not be sustained under either the taxing clause or the commerce clause. The former Future Trading Tax Act was declared unconstitutional on the authority of *The Child Labor Tax case*,

which were never allowed to mature, but were uniformly adjusted before maturity upon differences in market price, and without any actual delivery of the articles which were the subject matters of such pretended contracts. To remedy the mischief, the legislature, satisfied of the futility of attempting to suppress gambling in grain and other commodities by striking merely at the gambling contracts themselves and the parties entering into such contracts, has sought, by the statute of 1887, to suppress all bucket shops, offices, stores, or other places wherein gambling in grain or other commodities is conducted or permitted.

In *Weare Commission Co. v. People*, 209 Ill. 528, 542, the Supreme Court of Illinois said:

Under the testimony in this case, it is conclusively shown that plaintiff in error kept an office in Princeton, where these illegal purchases or operations of gambling in grain were carried on. Plaintiff in error can not relieve itself of responsibility upon the ground that it acted merely as an agent for its customers in these unlawful transactions.

See also *Central Stock Exchange v. Board of Trade*, 196 Ill. 396; *Weare Commission Co. v. People*, 111 Ill. App. 116; *Dickinson v. Board of Trade*, 114 Ill. App. 295.

In *Christie Grain & Stock Co. v. Board of Trade of Chicago*, 125 Fed. Rep. 161, 168, the United States Circuit Court of Appeals for the Eighth Circuit, speaking through District Judge Shiras (Circuit Judges Sanborn and Van Devanter concurring), said:

It is thus proven beyond all reasonable question that the Chicago Board of Trade maintains in the building owned by it in the city of Chicago a place known as the Exchange Hall, wherein the members of the board, acting for themselves, and also as brokers for outside parties, engage in making and carrying through deals in grain and provisions, in which it is not intended to make a future delivery of the article nominally dealt in, but which are to be settled by the payment of money only according to the fluctuations of the market and which are in all essentials gambling transactions.

the Chief Justice saying, "Our decision, * * * involving the constitutional validity of the Child Labor Tax Law, *completely covers this case*" (*Hill v. Wallace*, 259 U. S. 44).

While this court held that the employment of children in factories had no such relation to interstate commerce as to bring it within the Federal regulatory power, it held contemporaneously that commission merchants and traders, engaged in purchases and sales, identically as in the instant case (there are 1,600 members, Tr. 4), constituted a part of the current of commerce which was subject to regulation. Congress in enacting the Grain Futures Act followed the Packers and Stockyards Act and the decision of this court sustaining the same (*Stafford v. Wallace*, 258 U. S. 495). The argument of the appellees will be built along the same lines.

In *Otis v. Parker*, 187 U. S. 606, 607, 609, it was held that the State had the power to condemn contracts for sales of shares on margins, or to be delivered at a future day. In sustaining the validity of the following provision of the constitution of California—

All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction, this court, speaking through Mr. Justice Holmes, said:

Even if the provision before us should seem to us not to have been justified by the circum-

stances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the State thinks that an admitted evil can not be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts can not interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." (*Booth v. Illinois*, 184 U. S. 425, 429.) No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the fourteenth amendment became law, as indeed they were in some civilized States. (See *Ballock v. State*, 73 Maryland 1.)

We can not say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we

say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price, he gets the purchased article, whatever its worth may turn out to be. But if he buys stock on margin, he may put all his property into the venture, and, being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the Constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster. (*Cashman v. Root*, 89 California, 373, 382, 383.) If at that time the provision of the Constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the Constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in *Booth v. Illinois* (184 U. S. 425, 431), we are unwilling to declare the judgment to have been wholly without foundation.

II.

ASSIGNMENTS OF ERROR.

Generally speaking the 17 assignments of error are to the effect that the Grain Futures Act is unconstitutional and void in that—

First. It restricts the use of the mails.

Second. It seeks to prohibit the transmission by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States.

Third. It seeks to regulate commerce which is wholly intrastate and the act is not within the power of Congress to regulate interstate commerce.

Fourth. It denies to accused persons the right of trial for crime in courts created by law and presided over by judges holding office during good behavior; denies to accused persons the right of trial by jury and the right to be confronted with the witnesses against them; and that the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General constitute a commission for the trial of such persons for such crimes.

Fifth. It compels members of boards of trade and their customers to furnish evidence which may be used against them in a criminal case, and authorizes unreasonable searches respecting books and papers to be used in criminal proceedings against the owners of such books and papers.

Sixth. It deprives the members of boards of trade of the exclusive use of their private property resulting in the impairment thereof; and by forcing representatives of farmers' cooperative associations into membership, takes the private property of such boards of trade and their members for public use without just compensation.

III.

THE GRAIN FUTURES ACT.

The act is entitled "An act for the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes."

The act makes it unlawful (1) for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication, any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade; or (2) for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped or received in interstate commerce for fulfillment thereof. The act excepts sales made (a) by the owner or grower of the actual grain, the owner or renter of the land on which it is to be grown, or an association of such

owners, growers, or renters; and (b) by or through a member of a board of trade designated by the Secretary of Agriculture as "contract market."

The penal provisions apply to such prohibited use of the mails and of the agencies and instrumentalities of interstate commerce; the failure to keep required memoranda; knowingly or carelessly delivering for transmission through the mails or in interstate commerce false, misleading, or inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce.

In *Stafford v. Wallace*, 258 U. S. 495, Mr. Chief Justice Taft, speaking for the court, said:

We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees of Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Danciger v. Cooley*, 248 U. S. 319, 322.

The history and evil effects of trading in futures have become a substantial part of the literature of practically every branch of the Government.²

² President Wilson's communication, Feb. 7, 1917, to Federal Trade Commission, p. 315, Report, Federal Trade Commission, Sept. 15, 1920, Vol. I, Country Grain Marketing.

Report, Senate Committee on Agriculture and Forestry, July 8, 1921, Sen. Rep. 212, 67th Cong., 1st sess.; id., Aug. 23, 1922, Sen. Rep. 871, 67th Cong., 2d sess.; Report, House Committee on Agriculture, May 4, 1921, House Rep., 44, 67th Cong., 1st sess.

Statement, Senator Capper, explaining Senate Report, Aug. 9, 1921, Cong. Rec., Vol. 61, pp. 4760-4769, 67th Cong., 1st sess.

Annual Report Chicago Board of Trade, 1921, Report of Joseph P. Griffin, president, Chicago Board of Trade, Jan. 10, 1922, pp. 19-21.

Testimony, Joseph P. Griffin, Hearings, Future Trading Act, before the Committee on Agriculture, House of Representatives, 67th Cong., 1st sess., Series C, p. 159.

Testimony, President Wells, Minneapolis Chamber of Commerce, id., pp. 67-68, 85-91.

House resolution No. 424, 63d Cong., 2d sess.

Hearings on future trading before the Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 767-773.

Communication, Joseph P. Griffin, president, Chicago Board of Trade, to board of directors, Feb. 28, 1921, on the subject of public criticism of grain exchanges, p. 474, Hearings, Future Trading in Grain, Senate Committee on Agriculture and Forestry, 67th Cong., 1st sess.

Letter, Mr. Randall, of Messrs. Gill and Fisher, large exporter, future trading hearings, Committee on Agriculture, House of Representatives, p. 1007, 66th Cong., 3d sess., January-February, 1921.

Testimony, Hon. Henry S. Robbins, before Rules Committee, on House resolution No. 424, hearings on grain exchanges, U. S. Cong. 1914, p. 206.

Report, Senate Committee on the Judiciary, on Washburn "antioption bill." Senate Report No. 893, 62d Cong., 2d sess.

Statement of Senator Mitchell on Washburn "antioption bill," Cong. Rec., Vol. 23, Pt. VI, p. 5832.

Senate resolution No. 133, 67th Cong., 2d sess., directing Federal Trade Commission to investigate conditions affecting grain trade.

Testimony, Julius H. Barnes (now president United States Chamber of Commerce), future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., p. 839.

Letter, Julius H. Barnes to directors Chicago Board of Trade, May 13, 1922, grain futures hearings, Committee on Agriculture and Forestry, U. S. Senate, 67th Cong., 2d sess., p. 69, on H. R. 11843.

Testimony, Mr. Gates, former president Chicago Board of Trade, future trading hearings, Committee on Agriculture and Forestry, United States Senate, 67th Cong., 1st sess., p. 331, on H. R. 5676.

The act clearly defines the interstate commerce to which it applies. That the Grain Futures Act was modeled on the Packers and Stockyards Act is readily demonstrable from a comparison in parallel columns of section 2 of each act.

THE GRAIN FUTURES ACT.

SEC. 2. (a) For the purposes of this act "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale or cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorpo-

PACKERS AND STOCKYARDS ACT, 1921.

SEC. 2. (a) When used in this act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "meat food products" means all products and by-products of the slaughtering and meat-packing industry—if edible;

(4) The term "live stock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead;

(5) The term "live-stock products" means all products and by-products (other than meats and meat food products) of the slaughtering

Testimony, Joseph P. Griffin, president Chicago Board of Trade, future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 671-672.

Statement, Hon. Herbert W. Hoover, future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 895, 896, 900, 911, 913, 919.

Statement, Julius H. Barnes, id., pp. 856, 857, 863, 865.

See also future trading hearings, Committee on Agriculture and Forestry, United States Senate, pp. 75, 80, 84, and 88, on H. R. 5676.

Statement, Clifford Thorne, general counsel American Farm Bureau Federation and general counsel Farmers National Grain Dealers Association, future trading hearings, pp. 973, 974, House Committee on Agriculture, 66th Cong., 3d sess.

Statement, Frederic B. Wells, of F. H. Peavey & Co., id., 957.

Statement, Joseph P. Griffin, future trading hearings, Committee on Agriculture, House of Representatives, 66th Cong., 3d sess., pp. 671, 672.

Federal Trade Commission Report on Grain Trade, Vol. V, p. 29; same, Vol. V, pp. 183-185, 242, 253, 256; id., Report on Wheat Prices for the 1920 Crop, pp. 8 (13), 43, 60.

rated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia.

(b) For the purposes of this act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the *grain trade* whereby *grain and grain products and by-products thereof* are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for *manufacture* within the State and the shipment outside the State of the products resulting from such *manufacture*. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect there-

and meat-packing industry derived in whole or in part from live stock; and

(6) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory, or possession, or the District of Columbia.

(b) For the purpose of this act (but not in any wise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the *live-stock and meat-packing industries*, whereby *live stock, meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs*, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for *slaughter of live stock* within the State and the shipment outside the State of the products resulting from such *slaughter*. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or de-

to from the provisions of this act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

vice intended to remove transactions in respect thereto from the provisions of this act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States and foreign nation.

The machinery for the enforcement of the Grain Futures Act, though modeled on that provided for the enforcement of the Packers and Stockyards Act, is, for obvious reasons, much less elaborate.

Each act provides penalties for violation of its provisions and for judicial review of the official acts of the officers charged with the enforcement thereof. In the Packers and Stockyards Act the court review was made similar to that which prevailed for the judicial review of orders of the Interstate Commerce Commission. In the Grain Futures Act the court review was made similar to that which prevailed for the judicial review of orders of the Federal Trade Commission. Under the Packers and Stockyards Act, market agencies must register with the Secretary of Agriculture under such rules and regulations as he may prescribe. Under the Grain Futures Act, any board of trade may secure a designation as a "contract market," after complying with, and carrying out, certain conditions and requirements prescribed by that act.

Section 5 of the Grain Futures Act contains the rules and regulations imposed upon an exchange for designation. The first is merely a classification and is inclusive of all of the leading grain futures exchanges of the United States; the others are (b) the keeping

of memoranda of all transactions in grain, whether cash or futures, as directed by the Secretary of Agriculture; (c) the prevention of the dissemination by the exchange, or any of its members, of false, misleading, or inaccurate reports concerning crop or market information, or conditions that affect or tend to affect the price of commodities; (d) the prevention of manipulation of prices, or the cornering of grain by the dealers or operators upon the exchange; (e) discontinuance of the practice of discriminating against cooperative associations of producers; (f) the execution of orders and decisions of the special tribunal created by section 6.

The bill was filed by the Chicago Board of Trade, a corporation organized February 18, 1859, under special charter granted by the State of Illinois. It seeks judicial adjudication that the Grain Futures Act is unconstitutional and void, and an injunction is prayed against the United States attorney, the Secretary of Agriculture, and the postmaster at Chicago from enforcing the provisions of the act. The substratum of the case is, and the argument is emphasized in brief, that the defendants in the bill are, by reason of the decree of this court declaring unconstitutional the Future Trading Act (*Hill v. Wallace*, 259 U. S. 44), "and the facts hereinabove stated (in the bill), estopped to claim or assert in this suit that said future trading is interstate commerce or is not intrastate commerce or that Congress had, under the power conferred upon it to regulate interstate and

foreign commerce, power to enact any of sections 4, 5, 6, 7, 8, and 9 of said Grain Futures Act." (Tr. 17.)

In view of the well-known elementary principle that the court will consider the act in its entirety, it is significant that the distinguished counsel does not specifically assail the power of Congress to enact sections 2 and 3 of the Grain Futures Act.

So convinced is the learned counsel that the instant case is *on all fours* with *Hill v. Wallace*, that in drafting the bill he incorporated *in haec verba* the first 14 paragraphs of the bill drafted by him in *Hill v. Wallace*; thus, "and said bill contains the same allegations as are contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of this bill. (Tr. 14.)

In *Employers' Liability cases*, 207 U. S. 463, 504, this court adjudged the statute as unconstitutional and void because it embraced both subjects within and subjects beyond the authority of Congress to regulate commerce and the two were so interblended in the statute that they were incapable of separation.

In *Second Employers' Liability cases*, 223 U. S. 1, this court sustained the new statute enacted in the light of the previous decision. In his brief in the second case the late Solicitor General Lloyd W. Bowers, writing of the previous decision, said: (223 U. S. 25) * * * "while what was then said in the opinion of the court concerning the authority of Congress to regulate the liability to an interstate employee was not logically vital to the de-

cision, nevertheless the utterance was made after full discussion of the very question at the bar, after solemn consideration of the question by the court, and in a deliberate purpose of preventing misconception by Congress of the actual and limited scope of the exact decision, with the result that Congress should not mistakenly believe itself incapable of enacting a new statute affecting interstate employees alone."

Noteworthy is it also that in the instant case, as in the Packers and Stockyards Act, the Congress did not leave to allegations, issues, proofs, and judicial determination, in the first instance, the question of what constitutes interstate commerce under the Grain Futures Act; but the Congress reenacted section 2 of the Packers and Stockyards Act and specifically included the "individuals, associations, partnerships, corporations, and trusts" and their "transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as futures" as a part of the "current of commerce" for all practical purposes as if both parties and their transactions had been specifically listed therein.

The question is one of constitutional law, and is not whether these parties and their transactions are included within the Grain Futures Act by judicial interpretation, but whether the Congress had the power to designate them and their transactions as a part of the "current of commerce" and as such subject to regulation.

Hill v. Wallace is by no means an adjudication that the Grain Futures Act is unconstitutional. On the contrary it decidedly sustains the Grain Futures Act. Concerning the Future Trading Act, Mr. Chief Justice Taft, speaking for the court, said:

There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the board of trade in the city of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. *Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.*

It follows that sales for future delivery on the board of trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, *from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon.* *United States v. Ferger*, 250 U. S. 19. It was upon this principle that in *Stafford et al. v. Wallace et al.* (258 U. S. 495) we held it to be within the power of Congress to regulate business in the stock-yards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, *because Congress had concluded that through exorbitant charges, dishonest practices and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through.*

So, too, in *United States v. Patten*, 226 U. S. 525, it was held that though this court, as we have seen, had decided in the *Ware & Leland* case, 209 U. S. 405, that mere contracts for sales of cotton for future delivery which did not oblige interstate shipments were not interstate commerce, an indictment charging the defendants with having cornered the whole cotton market of the United States by excessive purchases of cotton for future delivery and thus conspired to restrain, obstruct, and monopolize interstate commerce in cotton, was sustained under the first and second sec-

tions of the Sherman Antitrust Law. This case, like *Stafford v. Wallace*, followed the principles of *Swift & Co. v. The United States*, 196 U. S. 375. But *the form and limitations of the act* before us form no such basis as those cases presented for Federal jurisdiction and the exercise of the power to protect interstate commerce. (*Italics ours.*)

The inevitable implication of this language was to authorize the enactment of the Grain Futures Act, which, in practically all of its beneficent aspects justified the exercise of the congressional power far beyond anything contained in the Packers and Stockyards Act.

The argument might well rest here. Significant, however, is the singular fact that the distinguished counsel for the appellants, in brief and appendix of over 150 printed pages, has cited and discussed over 100 cases and completely ignored the Packers and Stockyards Act and *Stafford v. Wallace*, 258 U. S. 495. His vast knowledge of the subject, his loyalty to his client, and his prodigious and successful labors in its behalf for more than 25 years, all taught him better than any man that the Grain Futures Act was modeled after the Packers and Stockyards Act; and that after the decision of this court in *Stafford v. Wallace*, sustaining that act to the limit, the Congress had accepted as its unmistakable constitutional authority for the enactment of the Grain Futures Act the previous adjudication of a coordinate branch of the Government.

IV.

THE "CURRENT OF COMMERCE."

The Grain Futures Act itself adjudges that the parties and their transactions embraced within the statute "shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another," etc.

The bill does not assail specifically these provisions of the act. On the contrary, the case sought to be made by the appellants appears to accept, certainly it does not directly challenge, this enactment of the Congress. Nor could such a challenge be considered in the absence of specific allegation, with ample proof in support of the same, that the enactment was contrary to the fact that the trading was in grain which never came into and never went out of the State of Illinois. This court has repeatedly taken judicial notice of the great Chicago grain market. Of course Congress could do likewise.

The bill alleges (Tr. 8):

Many of said members, including some of the co-complainants, daily engage, either as principals or as agents, in the making in said Exchange Hall of contracts with other members of the exchange for the purchase and sale of grain for future delivery, said contracts providing that the seller therein shall deliver in Chicago the grain covered by the contract

upon any day of the named month that he shall select. That more than 75 per cent of the volume of all the trading in said Exchange Hall consists of such trading for future delivery. Such contracts relate almost wholly to wheat, corn, and oats, and the volume of such trading is so large that said exchange has set aside in its exchange room three separate spaces, upon each of which it has constructed a circular raised platform, commonly known as a "pit," where its members may conveniently, and do daily, gather and make such future contracts with each other by open viva voce bidding; * * *.

The bill further alleges (Tr. 10):

That at the present time there are 12 warehouses, with an aggregate capacity of 12,950,000 bushels, whose proprietors have received under said statute licenses to conduct Class "A" warehouses, * * *. That in this trading for future delivery in the exchange room of said exchange during any year many millions of bushels of wheat, corn, and oats are bought and sold for future delivery, and as respects at least three-quarters of the grain covered thereby, said contracts are fulfilled or settled without any delivery of any warehouse receipts, but are settled through a system of offsetting purchases, etc.

The bill further alleges (Tr. 12):

That there is produced yearly in the United States more wheat, corn, and oats than is consumed within said United States; that from the year 1899 to the year 1913, both inclusive,

the number of barrels of wheat flour exported in any year, as disclosed by the statistics of the United States Department of Commerce, was not less than 8,826,000 barrels, and in one of said years the number of barrels exported was 19,716,000; and that during one of said years there was exported 154,856,000 bushels of wheat, and except in one of said years (when there was a failure of the crops) there has been not one of said years in which the amount of wheat exported did not exceed 23,000,000 bushels; and that during one of said years there was exported over 209,000,000 bushels of corn, and in none of said years was there exported less than 26,000,000 bushels of corn, and that yearly exports of oats during said years range from over 46,000,000 bushels to 1,000,000 bushels.

* * * * *

That approximately six-sevenths of all the trading in grains for future delivery upon the exchanges of the United States takes place in the Exchange Hall of said Chicago Exchange, but that other commercial exchanges which furnish to their members and their customers like facilities for making contracts for future delivery, are located and maintained at Minneapolis, Duluth, Kansas City, St. Louis, and Toledo, Ohio; that the members of all of such other exchanges are competing with the members of said Chicago Exchange for the business of making contracts for future delivery for customers and the purchase of cash grain at country points.

The bill further alleges (Tr. 13):

That on the contrary the purchase and sale of grain for future delivery upon said exchange and said other boards of trade is a distinct benefit to all producers and consumers, and to persons engaged in commerce in grain, in that it enables owners of grain to protect themselves against price fluctuations by the making of "hedging" contracts upon such exchanges.

The Committee on Agriculture and Forestry of the Senate, on August 23, 1922, submitted, by Senator Capper, its report on "Regulating Transactions on Grain-Future Exchanges."

On page 7 of the report it is said:

The definition of interstate commerce is identical with the definition in the Packers and Stockyards Act of 1921, except for such changes as are necessary to make it applicable to grain. This definition is based upon the decision of the court in the case of *United States v. Swift* (196 U. S. 396) and was upheld in *Stafford v. Wallace*.

The committee report quotes from *Stafford v. Wallace* as follows:

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out, to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows and the transactions which

occur therein are only incident to this current from the West to the East and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

In *New York & Chicago Grain & Stock Exchange v. Chicago Board of Trade*, 127 Ill. 153, 156, 161, 162, 163, the Supreme Court of Illinois said:

It has been said, and with much show of reason, that the floors of this Exchange Hall stand in the gateway of commerce. * * *

Four-fifths of the grain and provisions produced in the States and Territories of the

Northwest are bought and sold in this market, and the business there done is so vast in its proportions that it fixes the market prices of grain, breadstuffs, and meats for the extensive territory that is tributary to Chicago, and seriously affects, and to a considerable extent controls, the values of the necessities of life throughout the United States and the civilized world.

* * * * *

For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessities of life throughout the country and the world. The great power and influence which the board possesses in dictating market values are owing to the vast aggregation of products which are drawn to its portals for a market, and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business—though in form, and as between the members, the mere private and individual dealings of such members—is in reality the business of the numerous producers, consumers, merchants, and shippers for and on behalf of whom these members deal.

* * * * *

In this way the business of the country in buying and selling agricultural products has been brought under the control of the market

values for such products as fixed and determined on the board of trade, and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports, inaugurated, and for years persisted in, by the board of trade and the telegraph companies.

* * * * *

Assuming these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest.

In *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 245, 247, this court said:

The plaintiff was incorporated by special charter of the State of Illinois on February 18, 1859. The charter incorporated an existing board of trade, and there seems to be no reason to doubt, as indeed is alleged by the Christie Grain & Stock Company, that it then managed its chamber of commerce substantially as it has since. The main feature of its management is that it maintains an exchange hall for the exclusive use of its members, which now has become one of the great grain and provision markets of the world. Three separate portions of this hall are known respectively as the Wheat Pit, the Corn Pit, and the

Provision Pit. In these pits the members make sales and purchases exclusively for future delivery, the members dealing always as principals between themselves, and being bound practically, at least, as principals to those who employ them when they are not acting on their own behalf. * * *

As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world.

In *Chicago Board of Trade v. United States*, 246 U. S. 231, 235, this court, speaking through Mr. Justice Brandeis, said:

Chicago is the leading grain market in the world. Its board of trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade v. Christie Grain & Stock Co.* (198 U. S. 236). Its 1,600 members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products, and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (a) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (b) Future sales; that is, agreements for delivery later in the current or in some future month. (c) Sales "to ar-

rive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the board from 9.30 a. m. to 1.15 p. m., except on Saturdays, when the session closes at 12 m. Special sessions, termed the "call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the board.

In *United States v. Ferger*, 250 U. S. 199, 203, this court, speaking through Mr. Chief Justice White, said:

* * * it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it.

We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstruction to interstate commerce (*In Re Debs*, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.

In *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, 272, this court, speaking through Mr. Justice Holmes, said:

So far as the oil that it calls for goes out of the State with the general current it seems to us not to be distinguishable from the rest admitted to move in interstate commerce. No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one might have called for a delivery that probably would have been made from it in an event that did not happen, is going too far.

* * * * *

As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax to be valid "must not in its practical effect and operation burden interstate commerce." It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the begin-

ning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed.

In *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 281, this court, speaking through Mr. Justice Holmes, said:

In short, the great body of the gas starts for points outside the State and goes to them. That the necessities of business require a much smaller amount destined to points within the State to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow ending as

contemplated from the beginning beyond the State line. *Ohio R. R. Commission v. Worthington*, 225 U. S. 101, 108. *United States v. Reading Co.*, 226 U. S. 324, 367. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 113. We have mentioned only such facts as are sufficient for our decision, and have not noticed other objections urged against the law. What we have stated seems to us enough to condemn it as applied to this case.

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, 291, 292, this court, citing the two foregoing cases, and speaking through Mr. Justice Van Devanter, said:

The commerce clause of the Constitution, Article I, section 8, clause 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. (*Brown v. Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519.) On the same principle, where goods are purchased in one State for transportation to another the commerce in-

cludes the purchase quite as much as it does the transportation. (*American Express Co. v. Iowa*, 196 U. S. 133, 143.) This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton v. Missouri* (91 U. S. 275, 280): "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities." In *Kidd v. Pearson* (128 U. S. 1, 20) it was tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In *United States v. E. C. Knight Co.* (156 U. S. 1, 13) "contracts to buy, sell, or exchange goods to be transported among the several States" were declared "part of interstate trade or commerce." And in *Addyston Pipe & Steel Co. v. United States* (175 U. S. 211, 241) the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was inci-

dental to buying or selling it was not material whether it came first or last.

* * * * *

The State court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable. With equal basis it could be said that a shipment of merchandise billed to a point beyond the State of its origin might be halted by the shipper in the exercise of the right of stoppage *in transitu* before it got out of that State. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. See *United Fuel Gas Co. v. Hallanan*, *supra*.

In *Lemke, Attorney General, v. Farmers Grain Co.*, 258 U. S. 50, 53, Mr. Justice Day, citing *Swift & Co. v. United States*, and the three last foregoing cases, said:

The record discloses that North Dakota is a great grain-growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota to be shipped to and sold at terminal markets in other States, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by com-

plainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his "spread," or margin, of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal law.

That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle, *Dahnke-Walker Milling Com-*

pany v. Bondurant, 257 U. S. 282. * * *
 Applying the principle of that decision, and the previous decisions of this court cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce.

Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that

practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co. v. United States*, 196 U. S. 375; *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265; and *United Fuel Gas Company v. Hallanan*, 257 U. S. 277.

V.

THE SHERMAN ANTITRUST ACT.

In the enforcement of the Sherman Antitrust Act the jurisdiction of the courts has never been defeated on the ground that transactions such as those conducted by the Chicago Board of Trade were not transactions in interstate commerce.

Such practices as "" "running a corner," "ringing up," and "puts" and "calls" have become notoriously prejudicial to the public welfare. In some instances certain of those practices have been made the basis of indictments under the criminal laws.

In *United States v. Patten*, 226 U. S. 539, "running a corner" is defined as follows:

Upon the second argument the defendants contended, and counsel for the Government expressly conceded, that "running a corner" consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, "one of the important features of which," to use the language of the Government's brief, "is the purchase for future

delivery, coupled with a withholding from sale for a limited time;" and as this definition is in substantial accord with that given by lexicographers and juridical writers, we accept it for present purposes, although observing that not improbably in actual usage the expression includes modified modes of attaining substantially the same end.

In *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 246, 247, "ringing up" is defined as follows:

It appears that in not less than three-quarters of the transactions in the grain pit there is no physical handing over of any grain, but that there is a settlement, either by the direct method, so called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time against contracts to sell a like amount at the same time, and paying the difference of price in cash at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B 5,000 bushels of May wheat, and B has sold the same amount to C, and C to D and D to A. Substituting D for B by novation, A's sale can be set against his purchase on simply paying the difference in price.

In *Pearce v. Foote*, 113 Ill. 228, 234, "puts" and "calls" are defined as follows:

A "put" is defined to be the "privilege of delivering or not delivering" the thing sold, and a "call" is defined to be the "privilege of calling for or not calling for" the thing bought. "Optional contracts," in this sense, are usually settled by adjusting market values, as the party having the "option" may elect. It is simply a mode adopted for speculating in differences in market values of grain or other commodities.

The bill alleges (Tr. 13):

That, while in former times, when there were only a few participants in said future trading, who had large capital and credit, so-called "corners" in grain did occur at rare intervals, said exchange has for many years maintained and enforced rules (which are set out in this bill) to prevent the running of such corners; and that by reason of such rules and their enforcement—and perhaps the Sherman Antitrust Act—no corners have for the last 15 years occurred in the future trading in grain on said exchange, or said other boards of trade; and that no member of said exchange or of any of said other boards of trade, has ever been indicted or convicted under any of the statutes, State or Federal, which prohibit the running of "corners."

The counsel argues (Br. 20):

If this country exported *all* the grains that it raises, it might be said that whatever tends to raise the price is beneficial rather than

hurtful, and only such conduct or influences as tended to depress prices should be regarded as a burden upon commerce. But this country consumes the major part of its own grains, and this court has determined in *U. S. v. Patten*, 226 U. S. 525, that a conspiracy of persons to run a "corner" and thereby *increase* prices is so harmful to the public as to be within the Sherman Antitrust Act. * * * But "corners" in the grain market are "a thing of the past." The amount of capital and credit required, the probability of failure and consequent enormous losses, rules of the exchange prohibiting and penalizing "corners," and the decision of this court in *U. S. v. Patten*, 226 U. S. 525, have caused "corners" to be found only in past history.

In *United Mine Workers v. Coronado Coal Co.*, No. 31, Supreme Court, October term, 1921, decided June 5, 1922, this court, speaking through Mr. Chief Justice Taft, said:

It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint.

Taylor, in his *History of the Chicago Board of Trade*, Volume II, pages 991-1260, gives an interesting account of the details of many corners during the years 1900 to 1917, when the last edition of his book was published, including the corn corner in 1901; the corn corner in 1902; the oats corner in 1902; the wheat

corner in 1902; the oats corner in 1903; the wheat deal in 1903; the corn corner in 1905; the wheat corner in 1905; the wheat corner in 1906; the wheat corner in 1907; the wheat deal in 1907; the wheat, oats, and corn deals in 1908; the wheat corner in 1909; the wheat deal in 1911, the wheat deal in 1912, and the corn speculation in 1913.

The suggestion that these corners and deals are not now being manipulated because of the Sherman Antitrust Act would seem to be a confession that practices on the Chicago Board of Trade have a very direct relation to interstate commerce. To argue that these corners and deals do not recur because of the impending danger of criminal indictment, as in *United States v. Patten*, is an argument in favor of the Grain Futures Act rather than against it. The allegation and argument should not prevail that because of fear of criminal indictment offenses are not committed against the interstate commerce laws, hence there is no interstate commerce to regulate.

In *Stafford v. Wallace* this court made reference to certain criminal prosecutions under the Sherman Antitrust Act against illegal practices on the part of those engaged in the purchase and sale of live stock in the Union Stockyards. The manipulation of these corners and deals, and the fear of criminal indictment with respect thereto, might well be embraced within what this court referred to as the "special evidence" which the Congress had the right to consider.

In *United States v. Patten*, 226 U. S. 525, 540, 541, 542, 543, 544, this court held that "running a corner" on cotton was a conspiracy in restraint of trade and commerce and punishable by indictment under the Sherman Antitrust Act. In delivering the opinion Mr. Justice Van Devanter, speaking for this court, said:

We come, then, to the question, whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the States, and thereby to enhance artificially its price throughout the country and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of section 1 of the antitrust act, which makes it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several States." * * *

Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein. (Citing cases.)

* * * * *

It well may be that running a corner tends for a time to stimulate competition; but this

does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view.

It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton, a product of the Southern States, largely used and consumed in the Northern States. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern States. The corner was to be conducted on the Cotton Exchange in New York City, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success

depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the antitrust act is designed to prevent. See *Swift & Co. v. United States*, 196 U. S. 375, 396-400; *Loewe v. Lawlor*, 208 U. S. 274; *Standard Oil Co. v. United States*, 221 U. S. 1, *United States v. American Tobacco Co.*, 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and can not be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243; *United States v. Reading Co.*, 226 U. S. 324, 370.

That these practices have such a direct relation to interstate commerce as that they may be made the basis of suits under the Sherman Antitrust Act appears never to have been doubted.

In *Chicago Board of Trade v. United States*, 246 U. S. 231, as shown by the transcript in that case, the Government filed a petition in the district court against the Chicago Board of Trade, its officers and directors, alleging that, when carried into force and effect by the members thereof, the following rule was in violation of the Sherman Antitrust Act, viz:

SEC. 33. A. The board of directors is hereby empowered to establish a public "call" for corn, oats, wheat, and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.

B. Contracts may be made on the "call" only in such articles and upon such terms as have been approved by the "call" committee.

C. The "call" shall be under the control and management of a committee consisting of five members appointed by the president with the approval of the board of directors.

D. Final bids on the "call" less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in, and that with such market all making of new prices by members of this association shall cease until the next business day.

E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct, and upon conviction such member shall be suspended from the privileges of the association for such time as the board of directors may elect.

In answering, the defendants, by the same distinguished counsel who appears in the instant case, made no denial whatever that the transactions were in interstate commerce. On the contrary, the counsel left unchallenged the jurisdiction of the district court and came at once to the merits of the case. In his brief filed in this court on the appeal in that case he made certain verbal criticisms of the form of the injunction decree because it "regulates intrastate trade." But that was not in any sense a challenge of the jurisdiction of the court. Throughout the brief in that case he appears to have assumed that the transactions were in interstate commerce, as he rested his case on the argument that the persons who conducted the transactions were not engaged in a combination and conspiracy in restraint of trade and commerce in violation of the Sherman Antitrust Act.

The opinion of this court assumes that the transactions were in interstate commerce and that the parties were engaged in interstate commerce who conducted them. There is no suggestion whatever to the contrary. If the transactions were not in interstate commerce and the parties were not en-

gaged in interstate commerce who were conducting them, the distinguished counsel for appellants in that case who also represents the appellants in the instant case would quickly have made the point.

Moreover, that case has been cited in subsequent cases arising under the Clayton Act but never on the proposition that the transactions referred to therein were not in interstate commerce. (*Standard Fashion Co. v. McGrane Houston Co.*, 259 Fed. Rep. 793, 798.)

An exchange which deals in the purchase and sale of more grain than the whole world either produces or consumes must have a very real relation to interstate and foreign commerce.

VI.

TRADING IN FUTURES ON THE CHICAGO GRAIN MARKET SO VITALLY AFFECTS THE PUBLIC INTEREST AS TO PUT IT BEYOND THE POWER OF THE CHICAGO BOARD OF TRADE TO CLAIM THAT IT IS CONDUCTING ONLY A MERE PRIVATE BUSINESS.

The bill alleges (Tr. 18):

It (the act) seeks to deprive said exchange and its members of their property without due process of law in violation of the fifth amendment to the Constitution, in that, by compelling the admission to membership in said exchange of representatives of cooperative associations of producers, it deprives such exchange and its members of their exclusive right to use their private property, and thereby it will impair the value of said property and all memberships in said exchange.

It violates the fifth amendment to said Constitution in that it attempts, by forcing representatives of farmers' cooperative associations into membership of said exchange, to take the private property of said exchange and its members for public use without just compensation therefor.

The alleged property right involved already has been devoted to a public use. A practical monopolization of essential terminal grain marketing facilities exists when it appears that a combination controlling them arbitrarily and unreasonably excludes outsiders from access to them, or imposes upon others unnecessarily onerous tolls and conditions for the use and employment of such facilities. If the Chicago Board of Trade, having acquired an economically effective monopoly over the marketing machinery of the great bulk of the world's supply of grain, excludes other grain purchasers and dealers from membership, there results a trade monopoly whose effect, regardless of the intent, would burden and obstruct the movement of grain in interstate commerce.

In *Anderson v. United States*, 171 U. S. 604, 615, 618, 619, it was sought under the Sherman Antitrust Act to dissolve a traders' live-stock exchange and to enjoin the members from entering into or continuing any sort of combination to deprive any person engaged in shipping, selling, buying, and handling live stock for sale at the Kansas City Stockyards of free access to the market; it was shown that the traders' ex-

change, by rule, practically prohibited any of its members from doing business with any other dealer who was not a member of the exchange, or with any commission man who did business with such nonmember. This court said:

In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be considered they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act. * * *

All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof. * * *

The agreement lacks, too, every ingredient of a monopoly. *Everyone can become a member of the association.* (Italics ours.)

Ordinarily grain dealers may combine for the purpose of providing and controlling equipment and facilities for the marketing of grain for their common and exclusive use. In such cases other dealers may be admitted upon terms or excluded altogether. This arbitrary discretion is not absolute. *State v. Stock Exchange*, 211 Mo. 181, 197-198; 109 S. W. 675. It is surrendered when the property is devoted to a public use and the Sherman Antitrust Act takes it away when it is shown that its exercise has the effect of restraining, burdening, or monopolizing interstate commerce.

In *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 411, this court said:

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation * * *. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation" * * *. It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and can not be applied, though modern economic conditions may make necessary or beneficial its application. In other words, to say that Government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than Government possesses to-day.

In *Munn v. Illinois*, 94 U. S. 113, 126, 130, this court held that a business may so become affected with the public interest as to subject it to legislative control. In delivering the opinion this court said:

When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use * * *. Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation.

In *House v. Mays*, 219 U.S. 270, this court approved the decision of the Supreme Court of Missouri which sustained a statute prohibiting any deduction from the actual weight of grain pursuant to a rule of a board of trade. These cases establish the proposition that the by-laws and rules of exchanges are subject to legislative control whenever it is shown that they violate the law or are contrary to public policy. This court said:

The Kansas City Board of Trade * * * in the management of its affairs has such close and constant relations to the general public that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the State necessary or needful to protect the people against unfair practices that may likely occur from time to time * * *. If such State regulations are not unreasonable, that is, not simply arbitrary, nor beyond the necessities of the case, they are not forbidden by the Constitution of the United States.

In *Grisim v. South St. Paul Live Stock Exchange*, 188 Northwestern, 729, 730, 731, the Supreme Court of Minnesota (citing *Stafford v. Wallace*) sustained a State statute declaring void a by-law of a live-stock exchange prohibiting members from trading with nonmembers on the ground that such by-law was contrary to public policy. The court held that the legislature, in the exercise of its police power, may annul by-laws regulating the business conduct of the members of an exchange without impairing

the contract obligations of the exchange or its members; that a statute annulling such by-laws does not take members' property without due process of law, and that—

an association of such commission men may also be required to observe such reasonable regulations as the State sees fit to impose in the exercise of its police powers. * * *

Membership rights and privileges may be property, but they are property which is held subject to police power of the State so to regulate and control its use as to secure the public welfare. Rights of property, like other social and conventional rights, are subject to such reasonable restraints and regulations as the legislature may think necessary and expedient, provided always that it does not transcend the governing and controlling power vested in it by the Constitution. In short, the subordination of property rights to the just exercise of the police power is as complete as it is to the proper exercise of the taxing power. (Citing numerous opinions of this court.)

The Grain Futures Act (with respect to cooperative associations) provides:

When the governing board thereof does not exclude from membership in, and all privileges on, such board of trade, any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in cash grain business, if such association has complied, and agrees to comply, with such terms and conditions as

are or may be imposed lawfully on other members of such board: Provided, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association. (Sec. 5 (e).)

This section is sustained by the foregoing cases and merely prohibits discrimination with respect to membership on the part of an exchange which has been shown to be affected with a public interest. The section also forbids the making or the interpretation of a rule by the exchange which is unreasonable and arbitrary and is unfairly employed for the purpose of effecting an unreasonable discrimination against farmers who desire in a collective way to market their grain in Chicago without paying the customary tolls required of nonmembers by the commission members of the exchange.

The present rules of the Chicago Board of Trade, as construed by it, compel an association of producers, as a condition precedent to membership, to pretend to engage in a commission business, when in fact it is their intent and purpose to market their grain in Chicago on an actual cost basis. Such rules permit corporations to have the benefits of membership in the exchange through stockholder-officer representatives. As the exchange applies these rules, large corporations having an unlimited number of stockholders, such as the great packers, millers, elevators, and other grain dealers, may acquire the right to

use the exchange facilities for dealing in cash grain and futures without paying commission for such services or pretending to conduct a commission business, while a group of farmers is excluded from such membership unless it agrees to charge its members the prevailing commission rate. The exchange, through its rules, extends an opportunity to every combination of persons engaged in the grain business to employ its facilities without paying commissions, except an association of producers. This discrimination is based upon the erroneous conception that the commission members of the exchange have the right to force farmers desiring to market their grain at the terminals in a collective way to employ the commission members as their agents and that in order to enforce this assumed right the exchange should withhold membership from the farmers.

The practical effect of this policy of exclusion on the part of the exchange makes it difficult, if not impossible, for producers successfully to market their grain in Chicago without the intervention and employment of some commission member of the exchange. Therefore, membership in the exchange upon reasonable terms is a matter in which the public is deeply concerned and consequently is subject to public regulation. In Section 5 (e) of the Grain Futures Act, Congress has indicated a desire to eliminate these unfair practices on the part of the exchanges.

It is submitted that a person or association of persons desiring to market their grain in Chicago are confronted with substantially the same situation as that which met the railroad which sought to enter and pass through St. Louis.

In *United States v. Terminal Railroad Association*, 224 U. S. 383, 394, 395, 397, 398, 401, 404, 405, 410, it appeared that a combination of railroads had acquired control of practically all of the terminal facilities in St. Louis, which they operated on a cost basis and allowed other railroads entering St. Louis to use upon payment of specified tolls. The Government charged that this association was a monopoly and a combination in restraint of interstate trade and commerce. This court said:

Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Antitrust Act? * * *

The consequence to interstate commerce of this combination can not be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. * * *

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad having to pass through or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company. * * *

"The other companies use the Terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." * * *

If the Terminal Company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. * * *

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway is undeniable. * * *

While, therefore, the mere combining of several independent terminal systems into one may not operate as a restraint upon interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman Act. * * *

The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies, are (page 404) under compulsion to use the terminal system, and yet have no voice in its control. * * *

But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. * * *

This control and possession constitutes such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the East or West, as to

be both an illegal restraint and an attempt to monopolize. * * *

This court required that the Terminal Association should admit any existing or future railroad to joint ownership or control of the combined terminal property upon such just and reasonable terms as would admit such applicant upon the plane of equality with respect to benefits and burdens of the existing proprietary companies.

The Chicago Board of Trade has the same economic grip upon the marketing of grain there as the Terminal Association had upon the physical transportation system at St. Louis. The future trading facilities in Chicago are under absolute control of the Chicago Board of Trade. The peculiar and extraordinary situation which it occupies with respect to the handling of the great stream of interstate grain which flows through Chicago clearly justifies Congress in requiring the exchange to keep its doors open for the admission of otherwise eligible grain dealers on fair terms and in compelling it to refrain from unjust and arbitrary discrimination with respect to membership therein.

The admission of others with defined qualifications into membership of boards of trade or exchanges that all may trade upon the same basis under governmental regulation is not confiscatory of property.

The bill alleges that the Chicago Board of Trade now owns in fee real estate in the business district of Chicago upon which it has constructed a large building which provides it with an exchange room and

offices and also surplus space from which the exchange derives a substantial rental, and that a fair market value of such real estate and building, over and above a mortgage thereon, exceeds \$2,000,000. (Tr. 5, Br. 67.)

It is argued that this property is just as much privately owned as is any office building or private residence, and that it is as much a violation of the due-process clause for Congress to give outsiders entrance into this building as would be a statute compelling owners of residences to admit roomers into their homes. (Br. 67.)

It is further argued that the method prescribed in the Grain Futures Act "is to furnish—at the meager salary which our governments pay those who serve them—a deputy of a high official, who is possessed of all the wisdom necessary to keep the markets at the proper price level" (Br. 49), and that "this trade thermostat is to run upon the superior wisdom of a single human mind. Instead of natural prices there is to be substituted man-made prices." It is further suggested that "this deputy might himself trade and thus become interested in the course of prices." (Br. 50.)

Here again the Grain Futures Act is not unlike the Packers and Stockyards Act. The argument that the transactions on these boards of trade and exchanges will disturb transactions as between private parties which are entirely separate and apart from the public interest can not be sustained. The authorities are against it.

VII.

THE PROHIBITED USE OF THE TELEGRAPH LINES AND THE MAILS FOR TRADING IN FUTURES EXCEPT UNDER THE TERMS AND CONDITIONS PRESCRIBED BY THE GRAIN FUTURES ACT IS A VALID EXERCISE OF CONGRESSIONAL POWER.

The court will not review the judgment of Congress that there are evils inherent in transactions involving future trading. *Otis v. Parker*, 186 U. S. 606, 609.

Section 4 of the Grain Futures Act provides:

It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof, except—

The prohibited use of the mails to those engaged in transactions involving future trading except under the terms and conditions prescribed by the Grain Futures Act is amply sustained by repeated decisions of this court.

Telegraph companies are interstate carriers and subject to regulation as such. *Pensacola Telegraph Co. v. Western Union*, 96 U. S. 1. Section 1, act to regulate commerce, approved June 29, 1906 (36 Stat. 539, 544). Wireless and radio companies are also included, section 400, transportation act, 1920 (41 Stat. 456, 474, 475).

In *In Re Rapier*, 143 U. S. 110, 133, 134, 135, it was held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the United States and that under it Congress may designate what may be carried in the mails and what excluded; and that, in excluding various articles from the mails, the object of Congress was not to interfere with the freedom of the press, or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals. By a broad and sweeping act the Congress sought to eliminate from the mails lottery tickets and all relevant advertisements, circulars, pamphlets, *et hoc genus omne*. In sustaining the act this court said:

It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were intrusted, and that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the

exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The States before the Union was formed could establish post offices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post offices and post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but can not do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and

what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

We can not regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In *Lottery Case*, 188 U. S. 321, 353, 354, 358, it was held that lottery tickets are subjects of traffic among those who chose to buy and sell them, and the carriage by independent carriers from one State to another is interstate commerce which Congress may prohibit under its power to regulate commerce. In

delivering the opinion of the court, Mr. Justice Harlan said:

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of commerce that may be regulated by Congress, we can not accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Ascuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery

tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 Stat. 963. That fact is not without significance in view of what this court has said. That act, counsel for the accused well remarks, was intended to supplement the provisions of prior acts excluding lottery tickets from the mails and prohibiting the importation of lottery matter from abroad, and to prohibit the causing lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred, from one State to another by any means or method. 15 Stat. 196; 17 Stat. 302; 19 Stat. 90; Rev. Stat. Sec. 3894; 26 Stat. 465; 28 Stat. 963.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

* * * * *

If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat

avored in both National and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

Sustaining the prohibited use of the channels of interstate commerce for the transportation of lottery tickets and absolutely excluding the same therefrom, the court cited the acts and cases sustaining the same relating to transportation of diseased live stock and intoxicating liquors.

In *Hoke v. United States*, 227 U. S. 308, 320, 321, 322, this court, speaking through Mr. Justice McKenna, said:

Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided, or transportation induced, in interstate commerce for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between States, and that such being the right, another can not be made guilty of the crime of inducing or assisting, or aiding in the exercise of it, and "that the

motive or intention of the passenger, either before beginning the journey or during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat. 512, c. 172. *United States v. Popper*, 98 Fed. Rep. 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery case*, 188 U. S. 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise, as in the instances stated and which finds further illustration in *Reid v. Colorado*, 187 U. S. 137. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions.

Plaintiffs in error admit that the States may control the immoralities of its citizens. Indeed, this is their chief insistence, and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the States to regulate the morals of their citizens and assert that it is in consequence an invasion of the reserved powers of the States. There is unquestionably a control in the States over the morals of their

citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States, but there is a domain which the States can not reach and over which Congress alone has power; and if such power be exerted to control what the States can not, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the States. We have cited examples; others may be adduced. The Pure Food and Drugs Act (June 30, 1906, 34 Stat. 768, c. 3915) is a conspicuous instance. In all of the instances a clash of national legislation with the power of the States was urged, and in all rejected.

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people, and the power reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently, of girls.

In *Lewis Publishing Co. v. Morgan, Postmaster*, 229 U. S. 288, the case arose under the Federal power over the mails and in classifying first and second class mail matter. It was provided that a publication which did not show the names of its editors and publishers, stockholders and bondholders, the circulation, and which did not identify its editorial and reading matter from its advertisements would not be entitled to preferential rates. It was contended that this act was in effect a censorship of the press, and was intended to prevent anonymity in its printed contents. This court held that the classification was justifiable, and that in classifying mail matter it was and is in—

the power of Congress “in the interest of the dissemination of current intelligence” to so legislate as to the mails, by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers.

The provision that the Secretary of Agriculture may designate a board of trade or exchange as a contract market is not, in legal effect, unlike that contained in the Packers and Stockyards Act which authorizes him, from time to time, to ascertain, after such inquiry as he deems necessary, the “stock-yards” and “market agencies” which come within

the definitions prescribed by that act and to give public notice thereof. That in legal effect the designation of a "contract market" under the Grain Futures Act, and the posting of notices that "stockyards" are "market agencies," and that either such designation or such posting may be revoked for cause, in accordance with the provisions of the respective acts, is a proposition which, in view of the decision in *Stafford v. Wallace*, needs no further discussion.

VIII.

CONCLUSION.

The so-called estoppel against Congress from enacting the Grain Futures Act and against the representatives of the Government from enforcing the same should not prevail.

The whole case of the appellants is foreclosed by the Packers and Stockyards Act and the decision of this court in *Stafford v. Wallace*.

To discuss the voluminous affidavits of the learned professors of the great universities, setting forth the advantages of trading in futures that the law of supply and demand may be regulated, would serve no useful purpose. Probably most of them have had no practical experience in the commerce in grains. In any event the theory of our Constitution is that the Congress of the United States is a better judge of the common welfare than all the learned faculties of our universities. The theory may be wrong but the people, whose destinies are affected, seem to be con-

tented with it, and this court will respect the judgment of Congress in a practical matter. However, as our learned opponent has appended to his brief an appendix containing the voluminous opinions of professors of the universities, the Government has, against their theories, printed in a similar separate brief in the nature of an appendix a statement by the Department of Agriculture on the practical workings of the Grain Exchanges and especially of the Chicago Board of Trade—and a grain of practice is worth an ounce of theory.

The decree of the District Court dismissing the bill of complaint should be affirmed.

JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

R. W. WILLIAMS,

Solicitor, Department of Agriculture.

FRED LEES,

Assistant to the Solicitor,

Department of Agriculture.



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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BOARD OF TRADE OF THE CITY OF CHICAGO et al., appellants,	} No. 701.
v.	
CHARLES F. CLYNE, UNITED STATES DISTRICT attorney et al., appellees.	

APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS.

APPENDIX TO BRIEF FOR APPELLEES.

Believing that the judgment of Congress with respect to the prejudicial effect trading in futures on the Grain Exchanges has upon the free current of interstate and foreign commerce will be sufficient for this court to sustain a statute designed to end such abuses, we have contented ourselves in our main brief with the argument that this case is ruled by the recent decision of this Court in *Stafford v. Wallace*, 258 U. S. 495.

As, however, our learned opponent has seen fit to submit to this Court as an appendix the testimony upon this question of fact of numerous theorists who are connected with some of the colleges and universities of the country, we now submit as

an appendix to our brief a very careful and convincing statement prepared by the Department of Agriculture to show the prejudicial effect of unrestricted future trading upon interstate commerce and the reasonableness of the regulatory requirements of the act now under consideration. To avoid duplication, however, we have omitted from this Appendix that portion of the Department's memorandum which deals with the admission of cooperative associations to membership in the Chicago Board of Trade, that subject having been fully discussed in our main brief.

We think that the evidence herein submitted of the department of the Government which has the practical supervision of the agricultural interests of the country will have great weight with this Court—certainly more weight than can be attached to the abstract theories of college professors, even when fortified by a classical excerpt from an oration of one Lysias, who, some twenty-three centuries ago, expressed some opinions from the Bema with respect to grain dealers. Had we time we would be tempted to ascertain from Egyptologists whether King Tutankh-Amen may not have had some views on the subject of future trading when he was buried in the Tomb of the Kings thirty-five centuries ago, but as these “brisk and giddy-paced times”—to use Shakespeare's phrase—do not permit of such antiquarian researches, we think this Court will be amply justified in accepting the deliberate judgment not only of the

Department of Agriculture, with its intimate knowledge of the commerce in grain, but also of the Congress of the United States which, after many investigations and prolonged discussions in both houses of Congress, has twice reached the deliberate conclusion that the grain exchanges—notably the Chicago Board of Trade—in operating to the extent of 75 per cent on a purely speculative basis, are a positive burden on the current of commerce in grain which should flow unvexed to the great markets of the world.

SCOPE OF THE GRAIN FUTURES ACT.

Section 5 of the Act contains the conditions imposed by the Act upon an exchange for designation. The first may be disregarded here because it is merely a classification and is inclusive of all the leading grain futures exchanges of the United States. The others are (b) the keeping of memoranda of all transactions in grain, whether cash or futures, as directed by the Secretary of Agriculture; (c) the prevention of the dissemination by the exchange or any of its members of false, misleading, or inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodities; (d) the prevention of manipulation of prices or the cornering of grain by the dealers or operators upon the exchange; (e) discontinuance of the practice of discriminating against cooperative associations of producers; (f) the execution of orders and decisions of the special tribunal created by Section 6 of the Act.

It is submitted that these requirements are reasonable and closely related to exchange activities, and obviously designed to protect interstate commerce. Exchange members should, as a matter of business, and do now make memoranda of their transactions such as are required by the Act. They admitted in the hearings on this legislation and other bills pending in Congress that false reports, manipulation, and corners are abuses which should be eliminated, and that the exchanges have made rules for the purpose of preventing them. But these abuses go on, nevertheless. Mr. Julius H. Barnes, who is one of the country's biggest exporters of grain and during the war was first assistant to Hon. Herbert Hoover as food administrator and afterwards was head of the United States Grain Corporation, in a letter of June 2, 1921, to Mr. D. F. Piazzek, a partner in one of Mr. Barnes' several grain organizations, said:

I note what you write about the Chicago Board of Trade, and nothing has embarrassed me like the gyrations in Chicago, and the last day, the very day we were arguing before the Senate Committee, that the Governors of these Exchanges were making some progress themselves in eliminating manipulations. I had the pleasure of telling that to Mr. Field in New York to-day, who was the man who finally held the May in Chicago, and attempted to justify to me here. (Page 85 of the testimony taken by the Federal Trade Commission in New York on October 6, 1922.)

This Act is merely intended as an aid to the exchanges in their unsuccessful effort to remove these abuses. The exchanges say that they have no prejudice against cooperative associations as such and that they object to them as members only on the ground that their method of handling grain involves a violation of the existing exchange rule against rebates as construed by them. The Act merely prevents the exchange from discriminating against cooperative associations with respect to membership and provides:

That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such associations.

Clearly the return of such money is not rebating. It is discussed later in the brief.

THE GRAIN FUTURES ACT IS CONSTRUCTIVE.

The Grain Futures Act is the culmination of more than thirty years of consideration and investigation by Congress and Federal agencies of the business of trading in grain and other commodities for future delivery and the effect thereof upon interstate and foreign commerce. Numerous hearings were held on the different bills introduced in Congress during that period. Officers, directors, and other representatives of the Chicago and other grain exchanges attended these hearings and introduced both oral and documentary evidence. That the Chicago Board of Trade

was given full opportunity to present its views on the pending legislation is shown by its report for the year ended December 31, 1921, from which the following statement is taken from the report dated January 10, 1922, of its President, Joseph P. Griffin:

It is to the everlasting credit of Congress and State legislatures that they granted a full and free opportunity to explain the merits of the grain-marketing system. After eight months of pitiless publicity, of most searching investigation, these bodies—none too friendly—were unable to locate any vital defects in that system. As a consequence, the only laws that have been enacted are purely regulatory, and by affirmative action not only recognize, but, in fact, perpetuate practically every method of doing business on grain Exchanges. (Pages XIX to XXI.)

In the hearings on The Future Trading Act, exchange representatives referred to it as constructive legislation.

Mr. Griffin testified:

In principle I heartily indorse the Tincher bill. I do so because, unlike other measures, I deem it to be constructive. It is constructive, and unlike other measures because it does not seek to tear down and destroy the existing machinery for farm products without providing any substitute. It is further constructive because it proposes to abolish practices or abuses which, while perhaps not immoral or illegal, have no particular trade or economic value and may be deemed as wasteful. I fur-

ther indorse the bill because, as I understand, it recognizes the necessity for hedging; second, the bill recognizes that there can be no hedging without future trading; and, third, the bill recognizes that there can be no future trading without speculation—there can be neither hedging nor speculation without future trading. The bill does not defend the present system of marketing grain, but rather, as I understand it and view it, it provides that the existing machinery should be used until a better and improved substitute can be developed.

Now, the Tincher bill accomplishes, in my understanding, all of the objectives I have set forth, and consequently, except in a purely practical sense, I have no opposition to this measure. (Future Trading Hearings before the Committee on Agriculture, House of Representatives, 67th Congress, 1st Session, Series C, page 159.)

Mr. Wells, of the Minneapolis Chamber of Commerce, testified:

H. R. 2363, the so-called Tincher bill, embodies a great many constructive ideas, and with certain modifications to make it practical in its operation and to preserve the hedging markets, would, in my judgment, prove constructive legislation.

* * * * *

* * * but it strikes me that in the framing of the legislation now before you—and I will refer specifically to Mr. Tincher's bill as being the most constructive—you have

overlooked the requirements for a hedging market. (Id., pages 67-68.)

I am speaking now as a user of the facilities, and I am not saying they are ideal. I am not saying they could not be remedied. I am saying that a great deal that you propose in your bill is very much to the point and very constructive, but I do say that unless a class of traders other than those engaged in the grain and milling business are allowed to trade, you will narrow the markets to such an extent that they will lose their value as hedging markets.

* * * * *

I have no quarrel to make with such provisions of this bill as tend to place the grain exchanges under the supervision of a departmental head, provided that the arbitrary power to close those exchanges is not left with the head of the department. (Id., pages 85, 91.)

CONDITIONS PROMPTING LEGISLATION.

Future trading is carried on by the public and the grain trade for speculative purposes. Grain merchants, millers, and exporters also use future trading for the insurance which it affords them through "hedging" their transactions in actual grain. The speculator buys or sells according to whether he thinks the price will go up or down. He helps to make the market for the man who handles actual grain and resorts to the futures market for insurance purposes.

Country elevator men in Nebraska, Iowa, the Dakotas, and other grain-producing States, realizing that price fluctuations may occur before they can deliver in Chicago or some other terminal market the grain which they have purchased from farmers, sell futures on the Chicago Board of Trade or some other futures market for protection. Millers in Ohio and other States buy futures for protection while they are picking up the cash grain needed to fill contracts for future delivery of flour. The Liverpool grain merchant buys futures for protection while assembling his cargo of grain at Baltimore or some other port for shipment to Liverpool. The theory of these counter transactions is that cash and futures prices move along parallel lines and that, as the price of futures goes up or down, the resulting gain or loss offsets a corresponding loss or gain in the cash grain due to the corresponding fluctuations in the price of cash grain.

As a matter of common knowledge, the court knows that this country exports large quantities of grain and that the surplus from the great grain-producing States moves through Chicago and other gateways of commerce en route from the farms on which it is produced to the ultimate consumers in other States and in foreign countries. *Lemke v. The Farmers Grain Company of Embden, North Dakota*, 258 U. S. 50. It is obvious, therefore, that the bulk of the actual grain involved in the cash transactions with which these futures deals are thus interwoven

moves in interstate and foreign commerce. *The Chicago Board of Trade v. United States*, 246 U. S. 331. On account of the extent to which futures trading is used in connection with these transactions in interstate and foreign commerce, it is apparent that any manipulation or cornering of the futures market necessarily obstructs and burdens interstate and foreign commerce.

For many years it has been charged openly and repeatedly, not only by the public but by the grain trade, including many members of the grain exchanges, that the futures grain market has been manipulated and cornered to the detriment of both producer and consumer. In view of this widespread feeling of distrust and suspicion, bills have been introduced in Congress for the correction of these abuses, and numerous hearings have been held in connection with them. A resolution (House Res. 424) introduced in the 63d Congress, 2d Session, and referred to the Rules Committee, evidences the state of unrest and suspicion by the farmer and the public with respect to transaction on the futures market. The resolution says:

That it is the common practice of these controlling members by concerted action in these three great markets, offering or withdrawing enormous quantities of wheat of the public warehouses and terminal elevators and by concerted bidding and betting in the pit on futures, to depress or raise the price of wheat to suit the purpose of their gambling

operations; that the prices are by such combination and manipulation depressed while the farmers are compelled to market the heavy portion of each crop, and raised and manipulated so as to tempt speculative investors after the bulk of each crop is in the control of the combination; that for each bushel of real wheat actually sold and handled in each of these terminal markets at least 100 bushels are bought and sold in so-called future trading; that the multiplied expense of all such future trading, as well as most of the profits thereof, must come out of the real wheat actually marketed; that the only part of the gains of gambling in wheat not borne by the farmer or buyer of bread is borne by men tempted to speculate in the pit; that the number of embezzlements, bankruptcies, and wrecks caused by gambling in wheat futures is appalling; that the members of the Chicago Board of Trade, the Minneapolis Chamber of Commerce, and the Duluth Board of Trade, through whom such gambling operations are made, cover and hide the record of the losses sustained by speculators and refuse to exhibit their books to the State officials, whose duty it is to protect the public; that the Chamber of Commerce of Minneapolis and the Board of Trade of Chicago, by virtue of a large membership of wealthy men closely allied with banking institutions, transportation companies, and with certain daily newspapers of their communities, exercise and control an unwholesome influence in local government and public opinion. (Future Trading Hearings before

the Committee on Agriculture, House of Representatives, 66th Congress, 3d Session, pages 768-769.)

The state of the public mind and of the thought of some of the grain trade, including members and friends of the grain exchanges, is reflected in a letter of February 28, 1921, from the President of the Board of Trade of the City of Chicago to the Board of Directors of that institution. The letter follows:

CHICAGO, *February 28, 1921.*

BOARD OF DIRECTORS,

*Board of Trade of the City of Chicago,
Chicago, Ill.*

GENTLEMEN: It is a matter of common knowledge that the grain exchanges have recently been subject to much criticism. It is openly charged that many trade practices work to the detriment of both producer and consumer. These complaints are not confined to farmers, but rather include many elements in the grain trade (including members of this and other exchanges), millers, Members of Congress, and public officials.

Many writers heretofore friendly to exchanges have recently been very bitter in their denunciation, charging that the practices of which they complain can all be remedied from within, but allege that the exchanges are doing absolutely nothing in this connection. The officials of the leading exchanges of this country have denied the charges mentioned. That has been the attitude of this board. The denial of these allegations is undoubtedly

based upon the conscientious belief that the charges lack foundation.

However, it may be possible that the responsible officials of the several exchanges are too close to the subject and are prejudiced. It seems to me but fair and just and in exact line with our duty to examine the charges to determine their truth or falsity. Further, if there be of evil in our business it is our duty to meet the situation boldly and apply the cure ourselves rather than wait for legislative action, which may be hasty, ill-tempered, and unwise.

To that end I am herewith enumerating the practices which are claimed to be inimical to the welfare of producer or consumer, or both. I have embraced herein all the so-called evils which have been disclosed to me from any source, including the recent hearing before the House Agricultural Committee at Washington. I respectfully suggest that the board of directors give their serious consideration to the several subjects mentioned, so that within the next 30 days we may formulate a plan of action based upon an honest and conscientious examination of these complaints.

May I say for your information, I have also submitted practically a similar communication to the advisory committee.

This latter committee is made up of some of the best minds of our exchange, and I have asked them to give their best independent thought on these questions.

The evils or practices to which I refer are as follows:

Overspeculation.

Market manipulation.

Indemnity transactions.

Private-wire offices in smaller cities and villages in the agricultural district tributary to the terminal markets.

Trading in future delivery in the distant futures.

Failure to properly censor market news, crop reports, etc.

Short selling.

Suggestions as to a proper method of coping with this situation are numerous and come from many sources. Some are of the opinion that we should entirely abandon indemnity transactions and should forbid the operation of so-called country wire offices. Members of Congress, as well as representatives of farmers and trade organizations, have suggested that we limit the quantity of speculative transactions for each individual, and the same authorities also urge that we confine trading in future delivery to a short period of time—suggestions varying from 30 to 90 days. As to manipulation, if such practices exist, I think there will be no dissent to my statement that such practices should not only be disapproved but steps should be taken to render the operation of the manipulator impossible on this or any other exchange.

The subjects embraced in this communication are numerous and I recognize will require careful thought and deliberation. I

believe I have condensed in this letter all of the alleged evils of the exchanges. Let us approach the subject with an open mind. If our conscience tells us that any or all of these practices mentioned exist, and constitute an injustice to either the producer or consumer, or if we decide such methods are immoral or lacking trade or economic value, then I urge we meet the situation honestly and boldly, and apply the necessary cure.

Respectfully submitted.

J. P. GRIFFIN, *President.*

Mr. Randall, of Gill & Fisher, one of the largest exporters in the country, in a letter set out at page 1007 of Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, Third Session, in January and February, 1921, says:

The welfare of boards of trade, as well as the welfare of the merchants composing their membership, rests upon credit and reason. When a large part of our people discredits us for certain practices allowed under rules, and a state of unreason is produced which entails great loss on the public, then it is time for the boards of trade to take heed unto their ways and correct them by their own action before an unthinking and injured public opinion pulls down a building carefully erected during many years, but into which certain nuisances have gained admittance and been harbored unrecognized.

The present attorney of the Board of Trade of the City of Chicago (Mr. Henry S. Robbins), when testifying in that capacity before the Rules Committee in the hearings held in connection with House Res. 424, above referred to, said:

There are some thoughtless people who do not take a broad view of anything and who see nothing but evil in these exchanges. No thoughtful person, however, considers the commercial exchange as either entirely free from evil or wholly devoid of good. Those who oppose exchanges concede that they aid legitimate commerce but contend that their gambling preponderates. Intelligent friends of the exchange will concede that there is often gambling there, but claim that the aid they render to commerce outweighs the evil of this speculation. (Page 206, Hearings on Grain Exchanges, U. S. Congress, 1914.)

THE FINDING BY CONGRESS.

Upon the evidence adduced at the various hearings held during the past thirty years or more as a result of the numerous criticisms and complaints as to the conduct of the grain exchanges, Congress made a finding in Section 3 of The Grain Futures Act to the effect that grain futures sales as at present conducted on the exchanges are affected with a national public interest and that the sudden and unreasonable price fluctuations which occur as a result of speculation, manipulation, and control of such transactions are an obstruction to, and a burden upon, interstate commerce.

As a result of the hearings held on the Washburn "Anti-Option Bill," which was pending before it in 1892, the Senate Committee on the Judiciary made a report (Sen. Rep. No. 893, 62nd Congress, 2nd Session) to the effect that transactions in grain futures constitute a "great evil and injury which ought to be remedied." The minority stated that—

They also believe that the evil growing out of such dealings is great and demand(s) the prompt and efficient action of Congress. * * * They believe that Congress has full power, under the power to regulate commerce among the States or with foreign nations, to suppress the evil by direct action, and that such power ought to be exerted by the passage of a proper bill.

Senator Mitchell, of the Committee, submitted a separate statement of his views on the bill, in which he said:

I am of the further opinion that the commerce power, as defined in Section 8 of the Constitution * * * may, by proper legislation, be invoked in aid of the practical suppression under severe penalties of the business of dealing in options and futures, as defined in the first and second sections of the House bill, on the ground that such business, as is apparent from all the testimony taken before the Judicial Committee, is an obstruction to interstate commerce or commerce among the several States * * *. The effect of such legislation, it is hoped and believed, will have a tendency to minimize

the evil effects of speculative gambling in agricultural products, a system that creates a most deleterious and destructive competition with the sale of actual farm products, which tends to reduce the price of every bushel of grain, every pound of pork, and every bale of cotton, and affects adversely the material interests of the many million people who cultivate farms in this country. (Congressional Record, Vol. 23, Part 6, page 5832.)

The recent resolution (S. Res. 133, 67th Congress, 2nd Session) directing the Federal Trade Commission to make an exhaustive investigation of conditions affecting the grain trade is indicative of the present state of the Congressional mind. It recites:

Whereas the condition of the export market has been alleged as one of the reasons for the decline in the domestic prices of grain since the summer of 1920; and

Whereas there nevertheless has been during the past year a record volume of exports of grain from the United States and at prices showing a wide margin over the price at the farm; and

Whereas a wide spread of 15 to 20 cents between cash wheat and futures throughout the marketing season of 1920-1921 existed and was caused either by the unprecedented export demand or heavy pressure on futures, or both; and

Whereas the organization of the export trade and all the conditions connected with the export of grain by American exporters

and the purchase thereof by foreign buyers are of vital interest to American farmers and consumers:

EVIDENCE SUPPORTING THE FINDING.

EXCHANGES ARE AFFECTED WITH A NATIONAL PUBLIC INTEREST.

The declaration that sales of contracts for the future delivery of grain as conducted on the boards of trade are affected with a national public interest is abundantly supported by the evidence adduced at the hearings which were held by the committees of Congress having charge of the several bills for the regulation of the exchanges. Pertinent extracts from the testimony of some of the witnesses are set out below.

Mr. Julius H. Barnes said:

In view of the general recognition, in Congress and out, of the national service rendered by grain exchanges through their hedging facilities, a discussion of the economic benefits of exchange trading may be narrowed to a consideration of the defects or abuses in the national marketing structure, and the feasibility of remedying those defects or eliminating those abuses, without destroying the basic function of such exchange trading. The criticism directed at these exchanges, and the explanatory defenses aroused thereby in recent years, have apparently led to a very general understanding and acceptance of their great national service in the form of narrow trade margin between producer and consumer, due solely

to the liquid hedging facilities of those exchanges. (Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, page 839.)

Mr. Barnes, in a letter of May 13, 1922, addressed the president and directors of the Chicago Board of Trade, which is set out in full on page 69 of the Grain Futures Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 67th Congress, 2nd Session, on H. R. 11843, said in part:

The prime national service of Chicago future trading rests in the merchant's and miller's security, by insurance against losses by changes in price levels, and that that insurance feature preserves narrow trade tolls between farm and consumer, because facilitating large credits and ready consumption. That service when fully utilized covers nation-wide mill and merchant stocks in channels not naturally tributary to Chicago, yet moving on the security of Chicago hedges.

Mr. Gates, a member and formerly president of the Chicago Board of Trade, testified:

This is a national problem rather than a local problem. The fact that it is a market that is used by the people all over the country is the thing that gives it its national interest. We have no question about your right to legislate on this matter. * * * We are willing that there should be a supervision of our business in the national interest. (Future Trading in Grain Hearings Before the

Committee on Agriculture and Forestry, U. S. Senate, 67th Congress, 1st Session, on H. R. 5676, page 331.)

Mr. Joseph P. Griffin, while president of the Chicago Board of Trade, testified:

Vast quantities of grain which never come to the Chicago market are nevertheless hedged in the Chicago market. In fact, the Chicago market is practically the clearing house of the world for the purpose of price insurance. Dealers in Europe, Argentina, and Australia use the Chicago market for hedging operations. Grain dealers in Omaha, Kansas City, St. Louis, New York, Baltimore, Boston, Winnipeg, Montreal, and hundreds of other cities use the Chicago market for hedging purposes. The grain handled by these dealers may never come to Chicago, nevertheless these hedging operations protect these grain owners against price fluctuations while the grain is being handled in their home markets. Furthermore, dealers in Chicago annually handle many millions of bushels of grain which never come to Chicago, but which are purchased in one market and consigned to another. These dealers invariably use the Chicago market for price protection.

Exporters purchasing grain at various country points and consigning it to the seaboard for export almost invariably hedge their holdings on the Chicago market, although the grain may never come to Chicago. Furthermore, with the change of market conditions speculators may desire to decrease the amount of

their holdings, thus passing on to other speculators a part of the risk originally assumed. (Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, pages 671, 672.)

MANIPULATION.

There is a vast amount of evidence, including the testimony of men of high standing and of practical experience in the grain business and also of members of the grain exchanges, that there is manipulation of the markets. It will be noticed that some of them qualify their testimony by saying that short selling can not *permanently* depress prices. Congress has not said, and we do not contend, that it can do so *permanently*. The statement that it does not do so *permanently* by necessary implication admits that it does so temporarily. These temporary depressions are injurious because they affect in a general way the price of cash grain throughout the country, and particularly so to the farmer whose cash grain may be caught on the market. Such manipulated depressions are also injurious to the speculator holding contracts on small margins on the long side of the market. The existence of the exchange rules against manipulation is an admission that the future trading machinery is susceptible to manipulation and for that reason should be adequately protected against manipulation. The existence of such rules certainly does not deprive Congress of its right to legislate on the subject, but suggests to Congress the necessity

for such legislation, as the exchanges may abolish their rules at any time.

Hon. Herbert Hoover says:

On the other hand, I have the feeling that very large volumes of short selling that are deliberately intended to depress the price result in considerable injury and loss to holders, particularly farmers, who are not in a position to hold as against a lowering price, as in the case of men who have outstanding obligations. They are forced into liquidation, and grain is brought into the market that would not normally flow there, and thereby such a manipulation has a damaging effect on price and works great injustice. (Future Trading Hearings before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, page 896.)

The second form of manipulation and the one that I feel does at times take place, is the making of a drive on the price by either the sale or the purchase of such quantities as will affect the price by the volume of material coming to the market at that particular time. I would regard those transactions as an attempt to dislocate the normal flow of the law of supply and demand, and any attempt of any individual to dislocate a free market must be against public interest. I feel it is also against the interest of the individual producer, because a drive on the market that depresses the price must find a considerable number of farmers who, through the fall in price and their outstanding obligations, are

compelled to liquidate, and they have been done an injury. Incidentally, the commodity has been brought into the market, and an acceleration to depression has been created.

* * * * *

I would give it (a commission) some power of regulation over manipulation.

* * * * *

My impression is that there have been drives against prices. My mind approaches it from rather a different angle; that is, the fall of prices was probably made more precipitate by these drives against the prices. In the long run, the price will make itself on demand and supply, but manipulation of the type we are discussing serves to accelerate what will be inevitable, and the acceleration often works to the disadvantage of the producer. (Id., pages 911-913.)

(See also pages 895, 900, and 919.)

Julius H. Barnes says:

It is recognized also by every student of marketing that it is possible to use these same trading facilities for short selling, that by its own volume and weight becomes manipulative in character. The check on such influence lies in the fact that such sales must be bought back to a corresponding amount. Even such weighty selling, not met by equally weighty buying, can produce permanent declines only by the foresight that recognizes in advance the coming development of natural influences. Otherwise the very attraction of a clearly forced price would attract an absorptive buying that would nullify such efforts at depression.

But it is also true that even though such a price depression must be temporary in character it may, during its period of effectiveness, do substantial injustice by forcing the liquidation of grain held on margins, or by the price tendency thus displayed frightening owners otherwise confident of the ultimate value of their goods. The ethics of business morality frown upon such purely manipulative attempts. Traders possessed of resources extensive enough to make such manipulative selling effective, increasingly recognize the social injustice of deliberately creating a price level by sheer pressure of offerings. I am convinced that the greater part of the grain trade condemn such attempts, infrequent as they are. I am convinced they are steadfastly trying to devise methods of reducing or eliminating this character of trading without destroying the market fabric itself.

Exchange authorities have, step by step, in the past developed both the business conscience that condemns corners in grain and developed the methods to make them ineffective until they are almost now a matter of history.

It may not be too much to hope that a more enlightened business conscience, plus methods and practices developed by actual experience, may succeed in time in the reduction also of this admitted evil. Until that day care should be taken that the great daily and hourly service producing the low trade tolls be not wrecked or damaged and it is equally important that regulations be not

imposed which tend to put a premium upon the unscrupulous in business. (Id., pages 841-842.)

Frankly, I have not been able to see any way to protect against manipulative speculation, which may well be classed as objectionable in every way. To eliminate that without destroying the liquidity or readiness to trade and cover contracts, which is the very essence of these narrow trade tolls, it is not enough to protect the trades against radical changes in price—that is a great security—but there is a further service performed by this trading, which is the ability to cover a contract in two minutes, which could not be done if you limit the trading to hedging against actual grain.

* * * * *

I do speak of the exaggeration which I hope to see the trade themselves work out in time. At least we have made this much progress, that it is frowned upon as being unethical to use large resources to purchase wheat and influence the price level, even temporarily. It is not good ethics any more than spitting on the carpet is good ethics these days. (Id., pages 856-857.)

(See also pages 863 and 865, and pages 75, 80, 84, and 88 of Future Trading in Grain Hearings Before the Committee on Agriculture and Forestry, U. S. Senate, on H. R. 5676.)

Clifford Thorne, General Counsel for the American Farm Bureau Federation, an organization of some million and a quarter farmers, and General Counsel

for the Farmers National Grain Dealers Association, representing something like 300,000 farmers who own and operate their own cooperative elevators in midwestern States, testified:

In reply to that, I want to say that any artificial manipulation of the market interferes with this wonderful instrumentality which has been described as hedging. Further, I want to say that the people who generally profit on corners are not the growers of the grain. Anybody experienced in the grain trade will know that, and, further, I want to say that if a corner results in very excessive prices the reaction is almost inevitable for it to be in the other direction, and as a general rule you will find the producer will be able to market the bulk of his commodity when it is in the other direction; and, further, I want to add that the producer is not anxious to get excessive corner prices. He wants a fair, stable market, and that is what he is seeking. (Id., page 974.) (See also page 973.)

Mr. Frederick B. Wells, Vice President of F. H. Peavey & Co., a corporation owning or controlling a number of subsidiaries which operate country and terminal elevators, said:

While I believe that speculation is absolutely necessary for the existence of a satisfactory hedging market, I am strongly opposed to manipulative speculation and would gladly see it eliminated from the markets if it were possible without destroying the entire machinery. (Id., page 957.)

Mr. Randall, in his letter hereinbefore mentioned, said:

* * * There was no reason except the "smashing process" to break the December option in Chicago in two weeks from \$2.75 to \$2.06.

Because all the while, every day, more wheat was being sold to Europe than was being brought from the country. The export sales were limited only by prudence on the part of exporters.

I believe (in) trading in futures is an essential part of the grain business from the producer's side, the miller's side, and the exporter's side. It would be a bad day for the grain trade if trading in "futures" should be abolished, but there is a vast gulf between the legitimate trade and the gambling element. This chasm should be bridged by the boards of trade themselves before both sides lose their footing.

Joseph P. Griffin said:

In this connection it may be pointed out that while prices may undoubtedly be advanced by manipulation, particularly where manipulation goes so far as to establish a corner, it is impossible to permanently manipulate prices downward. The reasons for this will be pointed out in connection with the subsequent discussion of short sales. (Future Trading Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3rd Session, page 670.)

The Federal Trade Commission, in its report on The Grain Trade, says that up until 1900 the history of future trading on the Chicago Board of Trade is a history of corners, but that since that date corners have been comparatively few:

For the period prior to 1900, the history of future trading in Chicago seems to have been largely a history of corners, and the market seems to have afforded more opportunity for this and other forms of manipulation than for the development of an economic organization adapted to the needs of the public. However, this impression may be due to a tendency to record what is sensational rather than what is serviceable. Since 1900 there have been comparatively few important corners. (Page 29, Vol. 5, of the Report on The Grain Trade.)

In its letter of December 13, 1920, transmitting to the President its report on wheat prices for the 1920 crop, the Commission says (page 8):

(13) Prices of wheat futures, the decline in which has been especially the subject of criticism, are susceptible of manipulation. Wide fluctuations in prices and large discounts of the future price below the cash price have prevailed. This has made it unsatisfactory for "hedging," and hedging sales may also appear to be manipulative, because, if they are large, they may cause sharp depressions. Wheat futures are not functioning well, even according to the standards of their advocates.

At page 43 of that report, the Commission, speaking of the causes for the October, 1920, slump in wheat, says:

There was the usual feature of speculative momentum and rebound. There was doubtless much short selling.

At page 60 it says:

While fluctuations in wheat future prices, and, of course, in cash prices to some extent by way of reflection from the futures, may be explained primarily as due to the narrowness of the market, irrespective of the constituent elements of the trade, it is reasonable to suppose, and there is a good deal of grain trade opinion to the effect, that some of the extremes touched have been due to the speculative element. The shorts have at times carried the market too far and then have become frightened and run to cover. It is probable that the low price reached early in August was due to the speculators, at least in the sense that they carried the movement too far though export conditions or reports of conditions as regards export buying at that time pointed to a decline in prices. The low level touched in October was more probably chiefly due to the large Canadian crop and the movement for importation of wheat from Canada. Even those men in the grain trade who are friendly to speculation admit that the fluctuations of the market are greater because of the tendency to push things too far, which followed by too rapid reaction.

The Commission refers frequently in the first-mentioned report to Taylor's History of the Chicago Board of Trade. That author gives on pages 991 to 1260 of Volume II an interesting account of the details of many corners during the years 1900 to 1917, when the last edition of his book was published. The details of the corn corner in 1901 are found beginning at the bottom of page 1027; the corn corner in 1902 on page 1042; the oats corner in the same year on pages 1042 and 1043; the wheat corner of the same year on page 1043; the 1903 oats corner at the bottom of page 1064; the 1903 wheat deal at the bottom of page 1065 and top of page 1066; the 1905 corn corner at the bottom of page 1083; the 1905 wheat corner on pages 1091 and 1092; the 1906 wheat corner on pages 1108 and 1109; the 1907 wheat corner on pages 1118 and 1119; the 1907 wheat deal on pages 1125 and 1127; the 1908 wheat, oats, and corn deals on pages 1133 to 1141, inclusive; the 1909 wheat corner on pages 1146 to 1149; the 1911 wheat deal on pages 1163 to 1165, and 1173; the 1912 wheat speculation on page 1182; and the 1913 corn speculation on page 1190. We do not call attention to the war period because conditions were then abnormal.

The President, by letter of October 12, 1920, a copy of which will be found on page 11 of the Report of the Federal Trade Commission on Wheat Prices for the 1920 Crop, published December 30, 1920, ordered an investigation of market conditions because

of the widespread feeling of suspicion and distrust due to the sudden and unreasonable fluctuations which occurred that year in the price of December wheat on the Chicago futures market. The price had become so erratic as to discourage agriculture and demoralize legitimate business. Official quotations show that wheat broke 30 cents on the first three days of the month of October, advanced 20 cents the following week, dropped 15 cents in the next two days, advanced 31 cents in the next three days ending October 15, dropped 31 cents between the 15th and the 22nd, and advanced 21 cents by the end of October. It is absurd to say that such fluctuations are due to the normal operation of the law of supply and demand and that they are beneficial to the producer and the consumer.

In 1921 May wheat on the Chicago futures market was driven down 42 cents in March and the early part of April. Following this, it had advanced 65½ cents by May 24, then in two days dropped 20 cents, and in the next two days advanced 22½ cents to \$1.87½ on May 31. Violent fluctuations of this sort can not be based upon the law of supply and demand and are patently detrimental to both producer and consumer.

In May, 1921, July wheat advanced 26 cents from the 14th to the 25th, then declined 7 cents. From June 1 to 3 it advanced 13 cents and dropped 13 cents in the next four days. From June 7 to 10 it advanced 12 cents, dropped 10 cents in the next three

days, and by the 13th had advanced 14 cents. From June 13 to 24 it dropped 19 cents, advanced 10 cents in the next three days, dropped 16 cents in the next two days, then advanced 6 cents, and on June 30 the price was \$1.25, while on May 31 it was \$1.28½, a net difference for the month of less than 4 cents. These sudden marked differences were manifestly not due to the law of supply and demand, and obviously were detrimental to both producer and consumer.

On May 31, 1921, cash wheat (grades 1 and 2) sold within two cents of the May future. On the next day cash wheat (grade 1) dropped 36 to 38 cents, grade 2, 32 to 35 cents; and grade 3, 32 to 35 cents, while grade 4 advanced 10 to 15 cents.

In July, 1921, December wheat advanced 21 cents in less than two weeks on the Chicago Board, and in the next 10 days declined 17 cents. In two weeks in August it declined 15 cents, and in the following two weeks ending September 9 advanced 22 cents. Between September 9 and 26 it declined 17 cents, and in the next ten days declined 11 cents more.

In 1922 May wheat advanced 30 cents on the Chicago Board in February, declined 20 cents in March, and by April 22 had advanced 20 cents. In the last half of May it dropped 31 cents. On May 11 the directors of the Board of Trade made wheat in cars on track deliverable on May contracts pursuant to what is known as the emergency delivery rule of the Chicago Board of Trade. The sudden drop of 31 cents was no doubt due to forced sales occasioned

by the application of the emergency delivery rule, as there were then 4,700 cars of wheat on track in Chicago which could not be unloaded owing to lack of available public elevator space.

The sale of contracts for grain for future delivery on the Chicago Board of Trade annually involves from fifteen to twenty billion bushels of grain. The Board of Trade absolutely prescribes all the conditions for the delivery of grain on these vast transactions.

An exhaustive study of its ordinary rules for delivery of grain on these infinite future contracts discloses that normally, before any grain can be delivered, it must be: First, within the switching limits of Chicago; second, actually stored in one of the few Chicago elevators or warehouses previously designated for such purpose by the Board of Trade; third, that receipts of such warehouses for such grain shall be deliverable exclusively in the fulfillment of these contracts. The total grain-holding capacity of all these designated warehouses does not exceed 12,950,000 bushels (see complainants' bill of complaint). Obviously, these delivery rules exclude from delivery all grain otherwise available for delivery which is or may be stored in other warehouses located in Chicago whose total storage capacity exceeds 30,000,000 bushels, as well as all the available grain stored in any warehouse located at any other terminal market throughout the country. The requirement that only that part of the country's grain supply which has procured storage in one of the limited

number of regular warehouses in Chicago shall be available for delivery is both artificial and arbitrary. The disproportion between the great volume of grain sold for future delivery and the extremely limited physical facilities provided by the exchange for delivery is shocking and is utterly inconsistent with complainants' contention that the makers of these contracts seriously contemplate either the actual or constructive delivery of the grain involved in them.

The creation and maintenance of these unnecessarily restricted delivery rules by the Board of Trade convincingly evinces a deliberate intent on the part of the exchange to discourage and hinder, rather than to encourage and promote, delivery upon these future contracts and strikingly attests that the real purpose of these arbitrarily narrow delivery rules is to make price fluctuations in grain futures as far as possible dependent upon the local, rather than upon world or country wide, grain conditions and prospects. The emergency rules whose very existence conclusively discloses an admission on the part of the exchange that the ordinary rules of delivery are inadequate are also deceptive and ineffective because they only operate in the discretion of the directors of the exchange and are designed to punish manipulation and break corners rather than prevent these evil practices. The establishment and maintenance of delivery rules which prevent the delivery of eligible grain stored in numerous warehouses in the city of Chicago clearly hinder delivery and inevitably create conditions with

respect to delivery which are readily susceptible to manipulation and the practice of cornering on the part of powerful speculative interests. Such narrow rules for delivery attract speculation, precipitate violent price fluctuation, and invite manipulation and corners.

These delivery rules are a clever piece of legal camouflage designed to conceal the great quantity of sheer speculation in grain which is continuously present in the future trading operations on the Board.

It is submitted that these rules show on their face that they were framed to accommodate, and that they do accommodate, the wishes of a majority of those who buy and sell future grain contracts.

“Speculators do not want delivery.”

“Hedgers do not want delivery.”

“Millers seldom want delivery.”

(Pages 183, 184, 185, Report of the Federal Trade Commission on The Grain Trade, Vol. 5, Sept. 15, 1920.)

There are other rules such as those fixing the grades deliverable and the price discounts which manifestly operate out of harmony with cash grain market conditions.

SUSCEPTIBILITY TO MANIPULATION.

The future trading system as operated under the existing rules of the exchange is peculiarly susceptible to manipulation. Undoubtedly sufficiently large speculative purchases or sales of futures contracts produce artificial price fluctuations. As the price

effect of such trades depends upon the conditions surrounding the market necessarily the volume of the speculative trades which will produce such results can not be definitely known. It is known that frequently individual traders deal in contracts involving many million bushels of grain and usually such vast transactions temporarily at least raise or lower the price of grain above or below the price level of actual supply and demand. The rules of the exchange do not restrict the amount of trading which may be done by any interests or combination of interests, nor provide authority for ascertaining the amount of trading which is being done by any person or persons. The failure to provide such rules shows that the exchange has not effectively exerted its regulatory power to safeguard its machinery from the manipulative practices of powerful speculative interests which may be disposed to exploit it for selfish purposes. These vulnerable conditions are illustrated by the following excerpts:

Mr. VOIGT. Suppose we create no such agency, but simply pass a law prohibiting any person or any interest from having outstanding at any one time a speculative interest exceeding, say, 2,000,000 bushels. Would not that prevent manipulation of the market?

Mr. HOOVER. It might. There might be some occasions when the amount of trading was so small that 2,000,000 bushels of a speculative transaction directed to influence the price would be overpowering in the market.

Mr. VOIGT. Can you conceive of a trade of 2,000,000 bushels by any individual in the Chicago market by selling futures that would seriously affect the market?

Mr. HOOVER. I should think it actually possible for 2,000,000 bushels in one day to affect the market on some days. Generally speaking, I do not think that 2,000,000 bushels would enable anyone to affect the price. All I am contending is that there is probably no definite figure that could be arrived at by a discussion in these rooms that would be flexible at all times and under all conditions.

Mr. VOIGT. That may be true, but if you had a rigid law preventing any interest from exceeding the limit of 2,000,000 bushels in a purely speculative venture we might do some good, and we could not possibly do any harm. Is not that true?

Mr. HOOVER. I presume it would do some good.

(Page 919, Future Trade Hearings Before the Committee on Agriculture, House of Representatives, 66th Congress, 3d Session.)

SECRECY AS AN ADVANTAGE AT CHICAGO.—Another reason put forward as a ground for preferring the present system is that it facilitates the concealment of very large buying or selling orders. When the subject of a better clearing system was up for consideration in 1904 one of the chief objections raised was that because of it the clerks in the clearing house would be enabled to determine how the big interests stood. (Citing Taylor's History, page 1073.) Legal objections were also raised

as regards showing the origin of large orders and large open interests. (Page 242, Vol. 5, of the Report of the Federal Trade Commission on The Grain Trade.)

FALSE AND MISLEADING REPORTS.

False and misleading reports concerning market conditions which influence the price of futures are sent out by the members of the exchanges over their private wires and otherwise in interstate and foreign commerce. The Federal Trade Commission says (page 70, Vol. 5 of its Report on The Grain Trade), concerning such information, that it is "ephemeral," sent out without consideration and with little inclination to hold back anything that is interesting, and much of it is naturally nothing more than rumor, while some of it is "doubtless sheer invention, and often dishonest invention, to influence prices to some one's advantage." It further says (page 76), under the head "Circulation of False News and Advice" and "The Censorship at Chicago Not Efficient" (page 79);

One firm was on occasion exhorted not to give unverified rumors the standing they acquire by being put out over its wires. To pass on exaggerations is obviously not fair. If statements can not immediately be checked, they should be put out in a form to afford the possibility of checking. False or exaggerated statements often relate to sales for export and to alleged purchases in Argentina, or shipments from there. On one occasion

a member was sharply rebuked for reporting wheat fields "badly damaged" by a kind of frost that does not injure wheat. Of late, of course, military and political events have frequently been the basis of startling rumors. It does not appear that the "trade" has adopted the view that sensational reports are not good on their face, and that their use unverified and unqualified is a specie of dishonesty.

At least one case has transpired in which a member was strongly recommending the bear side of the market to those who would read his circular letters, when, as it appeared later, he was himself buying heavily. Reports and statements designed to influence the market in the opposite direction from one's own belief, as proved by one's action in the market, are so flagrantly dishonest that they might properly be made a felony. It does not appear that the Chicago board of directors did anything more than reprove the member apparently guilty of the conduct described. (Pages 76-77.)

THE CENSORSHIP AT CHICAGO NOT EFFICIENT.—The so-called censorship at Chicago adds considerably to the duties of the Secretary as a letter writer. The lesser importance of futures and of speculation on other exchanges means that the situation is not so exacting elsewhere. Evidence of anything more than letter writing at Chicago, at least of actual punishment of offenders, as distinguished from summons before the board of directors for explanations, is lacking. In

relation to one phase of the censorship, the Secretary himself refers to the "admonitions of the market reports committee having become valueless."

Perhaps if the problem were approached from another viewpoint the censorship would be more effective. Hitherto the underlying idea has been to "avoid giving offense to our enemies." In other words, these things are offensive to the public, and the Board tries to do some disinfecting or deodorizing. If the majority sentiment of the Board were opposed in principle to the seeking of commission earnings by its members where the presumption is that a disservice rather than a service is performed for the customer, then it might deal more effectively with attempts of commission houses to get as much as possible of such business by stimulating trade not merely through sensational news but by advice tending to keep customers moving "in and out" of the market. (Page 79.)

THE BURDEN ON INTERSTATE COMMERCE.

The manipulation, corners, and violent or unusually wide fluctuations in prices which have occurred on the Chicago Board of Trade have drawn vast quantities of grain to that market out of their wonted channel, to the detriment of both interstate and foreign commerce. Railroad cars and vessels required for the transportation of other essential commodities were used in this unnecessary and burdensome hauling. Unessential traffic is especially bur-

densome to commerce when our transportation facilities are crippled as they have been for several years on account of the war.

A notable instance of such diversion resulted from the Leiter deal in 1897. Vast quantities of wheat which had started to foreign markets were brought back to Chicago for delivery purposes and subsequently reshipped to foreign markets. Short interests at a very great expense chartered tugs to break the ice so that ships could bring grain from Winnipeg, Duluth, and other Northern points to Chicago to break the Leiter corner. The details of this are stated in Taylor's History at pages 945 and 946, Volume II.

The May, 1922, wheat deal attracted to Chicago vast quantities of grain which normally either were needed for consumption in other localities or should have gone out through Gulf points to foreign markets. Julius H. Barnes, speaking of this in his testimony at the hearing held by the Federal Trade Commission in New York on October 6, 1922, said:

Those large cash interests in Chicago began to collect wheat all over the country and head it to Chicago for delivery at these attractive prices, which by this time had reached a relation in respect to all of the markets which attracted wheat from every direction to Chicago.

The result of that was that by the end of the month there was accumulated in Chicago a stock of ten or twelve million bushels of wheat, which was beyond the normal absorb-

ing capacity of the consumption trade that rests on Chicago, and that wheat had been lifted by the incentive of these apprehensively made prices from centers where it should have remained for the consumption which normally overtakes it from those centers—Omaha, Kansas City, Minneapolis, all these other points. So that the country stock which should normally supply mills west of Chicago or south of Chicago were lifted out of their natural place and directed to Chicago by these apprehensively made prices, and there was collected in Chicago an almost unsalable quantity of wheat, which could only press in one direction, could not go back (pp. 75 and 76).

In a letter of May 13, 1922, to the Chicago Board of Trade (p. 69, Grain Futures Hearings Before Committee on Agriculture and Forestry, United States Senate, 67th Congress, 2nd Session, on H. R. 11843) he said:

Present conditions lay an economic burden on distribution cost by drawing wheat to Chicago out of its accustomed channels and from points of supply needed shortly for actual consumption elsewhere. These evil effects are solely from apprehension of a forced settlement at artificial prices on hedges properly used as insurance on price level fluctuations.

The members of the Exchange extensively and continuously use the mails and the telegraph, telephone, and other means of interstate communication in their solicitation of business outside of the State of Illinois. They operate private wires and maintain

in cities and towns in the different States branch offices for the purpose of procuring orders and facilitating their execution at Chicago. The larger part of the "futures" contracts executed on the Board of Trade are made by member brokers for persons living outside of the State of Illinois and in other States and foreign countries who are the principals and real parties in interest in such transactions. No rule or practice of the Exchange, which attempts to make the broker members the principals to such contracts, can strip such transactions of their real interstate character.

Should, as claimed by complainants, the ringing-out system practiced by the members of the exchange with respect to customers' contracts have the legal effect of extinguishing the contract made by the broker for his customer, such extinguishment necessarily would leave the broker occupying both the legal and practical relationship of bucketing the customer's order, as the customer's contract with him requires that the broker shall not only make such purchase or sale on the exchange for him, but shall retain such outstanding contract for his account until the settlement thereof. *Irwin v. Williar*, 110 U. S. 499, 515; *James v. Clement* (C. C. A.), 223 Fed. 385, 400, applying the *Christie case* (198 U. S. 236). The cancellation of margined contracts by the set-off or ring system, as well as the custom of requiring additional margins as the price moves up or down, which represent profits to the successful party to the contract,

and the retention of such moneys until final settlement accumulates large trust funds in the commission man's hands, much of which belong to their customers outside the State of Illinois. Many commission men have not resisted the temptation to speculate with these trust funds. It is known that frequently customers have suffered great losses through failures caused by the brokers speculating with these funds. The unbonded handling of such large trust funds both invites and justifies the strictest kind of government supervision.

Necessarily such contracts are made pursuant to orders which are transmitted through the mails or across State lines by telegraph, telephone, or otherwise. These contracts at their inception and during their pendency require the deposit of original and recurring margins amounting to millions of dollars, and at their conclusion require settlements involving large remittances. These margins and remittances are forwarded to and from Chicago through the mails and across State lines by telegraph, telephone, and otherwise and constitute a constantly recurring course of business.

Such of these transactions as are bona fide are by intent of the parties as well as in legal contemplation directly connected with the country's grain supply, because under the delivery rule of the Exchange some of the country's actual grain must upon demand or offer be delivered upon them at Chicago. The rules of the Chicago Board of Trade do not provide

that the grain which shall be delivered upon any of these contracts shall be grain grown in the State of Illinois or grain shipped in from other States which has become incorporated with the mass of property in the State of Illinois; but on the contrary authorize the delivery of such grain as shall be stored in elevators made regular by the complainant. The records show that much of the grain stored in these regular warehouses is grown in other States and shipped to and through Chicago on its interstate journey to points of consumption in other States and foreign countries. Obviously the grain employed in making these deliveries upon which the legality of the "futures" contracts absolutely depends is a large but indistinguishable part of that great continuous stream of interstate grain which goes to and through Chicago in its search for world-wide markets. A printed statement emanating from the Chicago Board of Trade says:

In the last sixty-five years a total of over 12,500,000,000 bushels of grain has been received and 10,000,000,000 bushels shipped out of Chicago. * * *

HEDGING IS PRICE INSURANCE.

With the natural expansion of the industry it became necessary to deal in contracts for future delivery of grain in order to properly facilitate the vast commerce which extends around the globe.

While other organized exchanges handle large quantities of certain grains, practically

the entire world looks to Chicago as the central futures market. Here a hedging contract may be consummated whether the grain to be insured is on the farm, in a country elevator, stacked on a foreign dock, or being moved across the sea.

Such a contract protects against sudden price changes due to adverse weather or transportation difficulties or the score of other factors entering into the marketing of grain. The producer can sell a futures contract and then deliver the grain at his convenience. The country buyer can hedge, or insure by a sale for future delivery and, being protected against loss, is enabled to pay a higher price to the grower than if he were to carry the risk of price fluctuation himself. Miller and exporter likewise use future contracts to obtain the insurance against loss.

Statistics show that approximately 250 million bushels of grain are shipped into Chicago annually and that fully eighty per cent thereof is shipped with the expectation that it will be, and it is actually, sent on into other States and foreign countries. A very large part of this grain, both from Illinois and other States, moves on a through freight rate commonly known as the Illinois Proportional Rate, which allows such grain a temporary stop-over in Chicago for marketing and processing purposes, pending shipment to eastern destinations. *Bacon v. Illinois*, 227 U. S. 504.

The foregoing facts show that these futures contracts are in a physical sense directly, intimately, and

inseparably connected with grain which is a part of the current of interstate commerce in grain, whereby grain is sent to Chicago from one state with the expectation that it will end its transit after purchase in another state.

It is admitted that the success and probably the existence of the futures trading system in grain depends upon a large volume of speculative transactions, obviously much larger than that which is or can be supplied by the people of Illinois, and that its maintenance depends upon the patronage of other states and foreign countries. Both the Exchange and its members gather from and distribute in other states and foreign countries a large volume of information pertinent to crop and market conditions.

The Exchange causes to be collected, every business day, the first price and each change in price made in the contracts for present and future delivery, which are entered into by its members in its exchange hall during its established business hours, and causes such quotations to be delivered in the City of Chicago to certain telegraph companies for compensation and with the understanding that such telegraph companies may transmit and distribute them through the country and throughout the world. The world-wide distribution of the prices at which these futures contracts are made has long since become a material, if not a dominant, factor or influence in determining the price of cash grain throughout the country and the world, as well as actual grain sold for deferred shipment. These prices,

and their immediate publication, create a national and world-wide psychological effect which exerts such a strong influence over both the buying and selling side of the merchandising of grain that no intelligent grain dealer will ordinarily buy or sell grain except in small quantities for immediate use or disposition without reference to and substantially in harmony with such prices.

The price influence and effect exercised by futures quotations which are sent out from Chicago are strikingly illustrated by the following facts: Usually quotations for three different months are carried simultaneously; for instance, in September the Board disseminates prices for September, December, and May deliveries. In some years in the month of September the "futures" prices for December and May deliveries are substantially higher than the current cash prices of grain, while in other years the December and May prices are substantially lower than the September price. When the December and May "futures" prices are higher than the cash price in September such relationship between such prices furnishes what is known to the grain trade as a carrying charge and creates a merchandising condition in the grain trade which enables the merchant-storers of grain, such as the great terminal elevators, to buy grain in September for storage and sell corresponding amounts of December or May futures. The difference between the price paid for the cash grain and the higher price at which it is hedged eliminates the merchandising risk and assures a reasonable storage compensation. Such

conditions stimulate storers of grain, who necessarily hold the grain from the period of harvesting to the period of consumption, to purchase grain freely. However, when the futures price is lower than the cash price of grain, such condition necessarily eliminates the carrying charge and naturally tends to discourage the great terminal elevators and other storers of grain from purchasing it. The fact that these different conditions have existed in different years clearly demonstrates the tremendous influence which future trading has, does, and may exert on grain prices.

Everywhere the forward quotations on distant delivery months notoriously influence the grain market. Again, data gathered by the Federal Trade Commission from 8,578 warehouses and elevators largely located in the northwestern grain belt of the country in which hedging is most extensively practiced shows that nearly fifty per cent of these warehouses and elevators hedge their grain purchases. Necessarily, whenever "futures" quotations are lower than current cash grain prices, such price relationship tends to discourage grain purchases on the part of merchants, because the profit-hedging facilities do not exist. It is also true that when grain prices are quoted to foreign countries, the trade usually bases its offers on the futures prices.

Approximately twenty to twenty-five per cent of the interests which buy grain from the farmer at country points hedge such transactions. As such

purchasers contemplate shipments for sale to the terminal market within thirty, sixty, or ninety days, at least, purchases made at such points in July, August, and the early part of September are made with reference to the September futures. Those made in October, November, and the early part of December are based upon the December futures. Similarly, purchases made in other months are based upon the nearest futures prices. Under such circumstances, the status of the futures price employed directly and materially affects the price which is paid the producer at the country point tending to stimulate or depress the country price according to whether such futures price is higher or lower than the current cash price at the nearest terminal market. When the futures price is higher than current terminal cash prices, that condition tends to enhance the farm price of grain because such condition furnishes ideal insurance facilities through hedging. On the contrary, when current cash prices are higher than such futures prices, the insurance facility is greatly impaired and results in tending to lower farm prices in order to cover the increased risk of merchandising grain from the country station to the terminal market.

It is admitted that there is an arbitrary variance between cash and futures prices, and that sometimes cash prices are higher while at other times they are lower than futures prices. An arbitrary price variation exists because there is a widespread

and well-supported prejudice against the quality of grain which may be delivered in fulfillment of a futures contract as well as a pervasive suspicion that the cash differential allowed by the rules of the exchange on some of such deliveries is not exactly fair to the purchaser who in many cases recognizes this but takes account of it in the purchase price. That cash prices are alternately higher and lower and frequently unreasonably so than futures prices is merely a result of the persistent effort which is continuously going on through future trading to create price fluctuations for the purpose of attracting speculative transactions. A raid on the futures market temporarily depresses such prices below the supply and demand price level, while a formidable buying campaign lifts the futures price above such level over more or less protracted periods of time. A careful comparison of contemporary cash and futures prices over a period of time shows that whenever there is a sustained substantial change in the price of futures, such change is inevitably substantially reflected in cash prices. While such prices do not move along precisely parallel lines, the trend of the futures is approximately followed by the cash.

COMMITTEE REPORTS.

The foregoing and much additional evidence of the same character was before the Senate and House Committees when they made their reports to Congress concerning The Future Trading Act and The Grain Futures Act. The House Committee, in its

report on The Future Trading Act (H. R. Report No. 44, May 4, 1921, 67th Cong., 1st sess.) said: "Scores of witnesses were heard by the Committee." The Senate Committee, in its report (Sen. Report No. 212, July 8, 1921, 67th Cong., 1st sess.) on the same act, said:

Every member of a grain exchange who testified before this committee acknowledged that there is at times excessive speculation and undesirable speculation in the futures market. Furthermore, it was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also, it was shown that a continually fluctuating and not a stable market is the desire of speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crops to the best advantage. A market without wide and frequent price fluctuations would greatly benefit the producer. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid at country stations, so an additional margin must be allowed for buying in the country. Also, when prices are fluctuating, as they have done for several months past, consignments of grain from country points to the terminal markets are more likely to find the bottom price of the day's price than the top. Fluctuations between the scalper, whether in the pit or at the cash grain tables, but work against the producer.

Furthermore, manipulation on the "short" or selling side of the market by big speculators, and "bear raids" by their followers, such as happen every year shortly before or immediately following harvest, play directly into the hands of European importers, who are enabled to buy millions of bushels of wheat in the futures market at a reduced price, which they later exchange for cash wheat.

The House, in its report (H. R. Report No. 1095, June 13, 1922, 67th Cong., 2d sess.) on The Grain Futures Act, speaking of the hearings on The Future Trading Act, says:

Producers, representatives of the exchanges, members of the exchanges, and others thoroughly familiar with the regulations of the exchanges were heard for several weeks, appearing before the Committee on Agriculture of the House and the Committee on Agriculture and Forestry of the Senate. This same committee conducted those hearings in the House, and thus became thoroughly familiar with the subject matter covered by this bill. * * * This bill attempts to prevent and remove obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges, the committee having found from all of the evidence, both at these and prior hearings, that transactions in grain involving the sale thereof for future delivery as conducted on boards of trade, known as "options" and "futures," are affected with a national public interest, etc.

The Senate Committee, in its report (Sen. Report No. 871, Aug. 23, 1922, 67th Cong., 2d sess.) on The Grain Futures Act, says:

The evidence adduced at the hearings held by this committee and the House Committee on Agriculture, when the former Act and this bill were under consideration, abundantly supports this finding (Section 3) and declaration in every detail. * * *

The far-reaching effect which transactions in grain futures exert or are capable of exerting on interstate and foreign commerce in grain thus becomes apparent, and it is equally clear that fluctuations due to manipulation are detrimental to farmers, dealers, and consumers. That manipulation occurs is known to every one familiar with the grain trade and is established by the testimony taken at the hearings. Sudden and unreasonable fluctuations frequently occur as a result of manipulation, which, although profitable to the manipulator, are detrimental to the producer and the consumer and the persons who handle grain and its products and by-products in interstate commerce. These fluctuations make the business of dealing in grain and its products and by-products in interstate commerce hazardous from time to time and therefore an obstruction to and burden upon interstate commerce in grain. * * *

The fluctuations in prices which have occurred since the court held the regulatory features of the future trading act unconstitutional have strengthened the farmer in his

belief that prices have been manipulated to his great disadvantage. From May to August, 1922, the price of wheat declined more than forty cents a bushel, notwithstanding a world statistical position indicating that consumptive requirements will be in excess of available supplies and a large part of the exportable surplus of the United States has already been sold. It is generally believed by the producers and the public that the severe decline at the beginning of the present crop movement was largely caused by "short selling" by professional speculators in volume which amounted to manipulation of the market, although the exchanges have contended that the decline has been largely due to heavy volume of hedging sales.

The evils and abuses on the exchanges prompting the legislation are pictured in the statement (Cong. Rec. Vol. 61, pp. 5220-5227, 67th Cong., 1st sess.) of Senator Arthur Capper, United States Senate, August 9, 1921, on the provisions of The Future Trading Act.

JUDICIAL NOTICE.

The court is not limited to the special evidence introduced at the committee hearings on The Grain Futures Act and The Future Trading Act, but may consider whatever general information was available to Congress. This opens a broad field of statistical and historical data for judicial review, as the character and functioning of grain exchanges have been under investigation and discussion for many years and much literature has been published

about them. The court will indulge the presumption that Congress was familiar with all this data and that the Members thereof possessed information which was acquired through practical experience. In *Stafford v. Wallace*, 258 U. S. 495, the court said:

It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us, in interpreting the effect and scope of the Act, in order to determine its validity, to know the conditions under which Congress acted. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Danciger v. Cooley*, 248 U. S. 319, 322.

The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

Letters as well as statements found in the committee hearings and reports may be noticed. *The Delaware*, 161 U. S. 459, 472. In that case the court noticed a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury "as a part of the history of the times."

The court will notice the reports of the Federal Trade Commission. *Temple v. United States*, 248 U. S. 121, 130.

The court may recur to the published history of the times in order to ascertain the reason of the law as well as the meaning of a particular provision therein. Article on Statutory Construction, Vol. I, Fed. Stats. Ann., 2nd Ed., p. 61. It may take notice of general writings on the subject. *Fenton v. State*, 100 Ind. 598.

The courts generally notice the existence of grain exchanges, their methods of transacting business, the trade usages and customs prevailing thereon, and the relation existing between such exchanges and the marketing and distribution of the country's grain crops, as well as the relation existing between such exchanges and the movement of grain in the channels of interstate and foreign commerce. The court may resort to available statistical and historical data for the purpose of informing itself as to the actual conduct and business practices of the exchanges as well as the practical effect upon the marketing of grain and the economic conditions of the country.

The Supreme Court of North Dakota, in *Green v. Frazier*, 176 N. W. 11, 19, comprehensively reviewed the system of transporting and marketing grain and also the effect which such system of marketing had upon the farm price of grain. This court, in *Green v. Frazier* (253 U. S. 233, 241), says the Supreme Court of North Dakota—

estimated from facts of which it was authorized to take judicial notice that 90% of the wealth produced by the State was from agriculture and that upon the prosperity and welfare of

that industry other business and pursuits carried on in the State were largely dependent. * * * The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources amounted to \$55,000,000 to the wheat raisers of North Dakota.

THE LEGAL EFFECT OF THE FINDING.

The finding made by Congress in The Grain Futures Act will not be disregarded by the courts except upon a very clear and positive showing that it is wholly unsupported by the facts. This seems to be the obvious effect of numerous court decisions.

A similar finding is made in the recent Act of Congress approved September 22, 1922 (Public—No. 348—67th Congress), providing for the appointment of a Federal fuel distributor, and a precedent for both is found in the Lever Food Control Act of August 10, 1917, 40 Stat. 276. The Supreme Court of Massachusetts recently had occasion to pass upon the effect of the declaration in the Lever Food Control Act in the case of *Lajoie v. Milliken*, 136 N. E. 419, in which it said:

The declared purpose of a legislative enactment is to be accepted as true unless incompatible with its meaning and effect. There is no rational ground for doubting that the purpose of the so-called Lever Act as thus declared was true and genuine (p. 423).

Camas Stage Co. v. Kozar (Oregon), 209 Pac. 95.

In *Booth v. Illinois*, 184 U. S. 425, 429, the Supreme Court said:

If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

In *Ex parte Young*, 209 U. S. 123, 165, the court said:

An act of the legislature fixing rates, either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary.

Flint v. Stone Tracy Co., 220 U. S. 107, 147, 153, 156;

Smith v. Kansas City Title Co., 255 U. S. 180, 210.

In *Price v. Illinois*, 238 U. S. 446, 452, the court said:

The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was

unquestionably harmless with respect to its contemplated uses, that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided.

In *Rast v. Van Deman & Lewis*, 240 U. S. 342, 357, the court said:

It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chi., Burl. & Quincy R. R. v. McGuire*, 219 U. S. 549; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 413, 414; *Price v. Illinois*, 238 U. S. 446, 452.

Respecting the emergency declared by the District of Columbia Rents Act, the Supreme Court, in *Block v. Hirsh*, 256 U. S. 135, 154, said:

No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. *Shoemaker v. United States*, 147 U. S. 282, 298. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 606. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 227. *Producers Transportation Co. v. Railroad Commission*, 251 U. S. 228, 230. But a declaration by a legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.

Levy Leasing Co. v. Seigel, 258 U. S. 242, 246.

In the recent decision of the Supreme Court in *Stafford v. Wallace*, 258 U. S. 495, under the Packers & Stockyards Act, 1921, the court said:

Whatever amounts to more or less constant practice and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily

for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

**THE GRAIN EXCHANGES DEALT WITH BY THE ACT ARE
NATIONAL PUBLIC UTILITIES.**

The Court in its decision in the *Munn case*, 94 U. S. 113, unmistakably declared that a business may become affected with a public interest and in that event is subject to legislative control. There the Court said:

When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use (p. 126). Enough has already been said to show that when private property is devoted to public use it is subject to public regulation (p. 130).

In *House v. Mayes*, 219 U. S. 270, the Court said:

The Board, in the management of its affairs has such close and constant relations to the general public, that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the State necessary or needful to protect the people against unfair practices that may likely occur from time to time.
* * * If such State regulations are not unreasonable—that is, not simply arbitrary, nor beyond the necessities of the case—they

are not forbidden by the Constitution of the United States (pages 284-285).

The recent case of the *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 411, says:

The cases need no explanatory or fortifying comment, they demonstrate that a business, by circumstances and its nature, may arise from private to be of public concern and be subject, in consequence, to governmental regulation. * * * "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation" * * *. It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and can not be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that Government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than Government possesses to-day.

National Union Fire Insurance Co. v. Robert Wanberg, decided by U. S. Supreme Court, November 13, 1922.

Is the business conducted by the Grain Exchange upon which future trading is carried on within the foregoing principle of law? In 1859 the Chicago Board of Trade sought, obtained, and accepted from the State of Illinois a charter making it a body politic and corporate and through said charter ac-

quired quasi public and judicial powers, including the power to subpoena witnesses, administer oaths, and make awards, which awards when filed in court have the force and effect of a judgment; the power to appoint one or more persons to examine, measure, weigh, and inspect flour, grain, and other articles of produce dealt in by the members of the Board with a provision that the certificate of such person or persons as to the quality or quantity of any such article shall be evidence between buyer and seller of the quantity, grade, or quality of the same, and shall be binding upon the members of the Board and others interested; the power to make and establish rules, regulations, and by-laws for the management of its business, and the power to inflict fines upon any of its members and collect the same for breach of its rules, regulations, or by-laws. Pursuant to such powers the Chicago Board of Trade provided the facilities and equipment necessary for the weighing, sampling, grading, and marketing of the grain received at Chicago by its members, equipped a future trading system, and began to gather and disseminate throughout the country data pertaining to the grain crop and its market conditions, and to disseminate through the channels of interstate and foreign commerce quotations resulting from the dealings in futures carried on by its members. The Chicago Board of Trade and its members solicited grain growers and dealers in neighboring States to ship their grain to the members of the Board for sale, and

solicited millers, merchants, and exporters everywhere to buy such grain from its members. From 1859 to the present time farmers and local elevators throughout the country have been continuously consigning their grain to members of the Board for the purpose of sale, and its members have received and handled such grain. Both the Board and its members have continuously since 1859 solicited farmers, elevator men, grain dealers, millers, and exporters everywhere to use the facilities of the Exchange for hedging purposes and have solicited the public generally to use such facilities for speculative purposes. They have generally invited public patronage and have charged and collected self-fixed commissions for services rendered. The performance of these vast and intricate fiduciary services for the public for compensation over such a long period of time has made the public dependent upon the Exchange and its members in the matter of marketing its cash grain, and hedging against price fluctuations, and in a practical sense has enabled the Exchange and its membership to acquire monopolistic control over the great cash and futures grain market which has been built up in Chicago. *United States v. St. Louis Terminal*, 224 U. S. 383, 405. The manner in which the Chicago Board of Trade and its membership have devoted themselves to the public service with respect to the marketing and hedging of the country's grain crop demonstrates that the Exchange has such close and constant relations with the general public that its business has become a National public utility.

The facts recited fully support the decision of the Supreme Court of Illinois, which holds that the Chicago Board of Trade has become affected with a national public interest. That court in *New York and Chicago Grain and Stock Exchange v. The Chicago Board of Trade*, 127 Ill. 153, 2 L. R. A. 411, said:

It has been said, and with much show of reason, that the floors of this exchange hall stand in the gateway of commerce. * * *

Four-fifths of the grain and provisions produced in the States and Territories of the Northwest are bought and sold in this market, and the business there done is so vast in its proportions that it fixes the market prices of grain, breadstuffs, and meats for the extensive territory that is tributary to Chicago, and seriously affects and to a considerable extent controls the values of the necessities of life throughout the United States and the civilized world.

For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessities of life throughout the country and the world.

The great power and influence which the board possesses in dictating market values is owing to the vast aggregation of products which are drawn to its portals for a market

and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business, though in form and as between the members the mere private and individual dealings of such members, is in reality the business of the numerous producers, consumers, merchants, and shippers for and on behalf of whom these members deal.

* * * * *

In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and determined on the Board of Trade; and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports inaugurated and for years persisted in by the Board of Trade and the telegraph companies (p. 414).

The Supreme Court of Illinois, in referring to this case in a later decision in *American Livestock Commission Company v. Chicago Livestock Exchange*, 18 L. R. A. 190, 200, said:

By this means (the compiling and furnishing of market quotations) the business of buying and selling agricultural products throughout the entire country had been brought under the control of the market prices fixed and determined on said board. * * *

But when the Legislature, acting upon a competent statement of facts, has interposed

and declared the business to be *juris publici*, all difficulty is removed.

* * * * *

These facts (the magnitude of the business of the Livestock Exchange) would doubtless be sufficient to warrant the Legislature, in the exercise of its legislative discretion, in declaring a public use, and placing said business under legal control and supervision; but such power, in our opinion, does not rest with the courts.

The Court knows that the grain exchanges at the terminal markets are as essential to the marketing of grain as stockyards are to the marketing of livestock.

THE POWER OF CONGRESS.

We have already shown in our main brief that Congress has plenary regulatory power over everything moving from one State to another, and particularly so when the transportation is for hire and involves the use or employment of the mails or the telegraph, telephone, or other facilities of interstate commerce. All the decisions of this court establish the principle in our constitutional law that the power of Congress to regulate interstate commerce is a broad and complete power, acknowledging no limitations except those contained in the Federal Constitution. *Gibbons v. Ogden*, 9 Wheat. 1. The extent to which this regulatory power may be exercised is determined by the character of the subject matter which is to be regulated and always extends to prohi-

bition when necessary to protect the health or morals of the public and to restrain the perpetration of fraud or deceit. Congress has prohibited the shipment in interstate commerce of (1) meat which has not been inspected, examined, and marked "inspected and passed," Act of March 4, 1907, 34 Stat. 1256, 1260; (2) nursery stock in violation of a quarantine, Act of August 20, 1912, 37 Stat. 315; (3) birds or animals killed in violation of a State law, Section 242 of the Criminal Code of the United States; and (4) unmarked renovated butter, Act of May 9, 1902, 32 Stat. 193. This court has uniformly approved Acts of Congress prohibiting the shipment from State to State of (1) adulterated or misbranded foods or drugs, *Hipolite Egg Company v. United States*, 220 U. S. 45; *Weeks v. United States*, 245 U. S. 618; (2) diseased cattle, *Reid v. Colorado*, 187 U. S., 137; (3) women for immoral purposes, *Hoke v. United States*, 227 U. S., 308; *Caminetti v. United States*, 242 U. S. 470; (4) liquor in violation of the laws of the State into which carried, *In re Rahrer*, 140 U. S. 545; *Clark Distilling Company v. Western Maryland Railroad Company*, 242 U. S. 311; *United States v. Dan Hill*, 248 U. S. 420; (5) obscene literature and articles for immoral and indecent purposes, *United States v. Popper*, 98 Fed. 423; (6) demoralizing picture films, such as prize fighting, *Weber v. Freed*, 239 U. S. 325; and (7) lottery tickets, the *Lottery Case*, 188 U. S. 321.

In the *Dan Hill* case the court said:

Congress may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress, acting independently of the States, may induce legislation without reference to the particular policy of law of any given State. Acting within the authority conferred by the Constitution, it is for Congress to determine what legislation will attain its purpose. Page 425.

In the *Lottery Case* the court extensively reviewed the power of Congress to prohibit the introduction into interstate commerce of everything which is or may be prejudicial to the health, morals, or safety of the public. In that case the court said:

Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse. Page 348, quoting from the *Passenger Cases*, 7 How. 283.

Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Page 350, quoting from *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.

Page 351, quoting from *County of Mobile v. Kimball*, 102 U. S. 691.

In *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356, the court recognized the commerce with foreign countries and among the States which Congress could regulate as including not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons and the transmission by telegraph of ideas, wishes, orders, and intelligence. (Pages 351-352.)

At the present term of the court we said that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." (Page 352.)

We come then to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one State to another. (Page 353.)

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States. (Page 354.)

We have said that the carrying from State to State of lottery tickets constitutes inter-

state commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States? (Page 355.)

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress can not be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phalen v. Virginia*, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when

placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals nor excuse its failure to perform a public duty by saying that it has agreed, by legislative enactment, not to do so. (Pages 355-356.)

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?

* * * What clause can be cited which in any degree countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? * * * But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element

that will be confessedly injurious to the public morals. (Pages 356-357.)

Besides Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. * * * We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, can not be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. (Pages 357-358.) * * * If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation.

It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it can not be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one State to another. (Page 358.)

We decide nothing more in the present case than that lottery tickets are subject of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that * * * Congress * * * has plenary authority over such commerce and may prohibit the carriage of such tickets from State to State. (Page 363.)

The first prohibition in Section 4 of The Grain Futures Act applies to the delivery for transmission through the mails or in interstate commerce by telegraph or other means of communication, of any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of any contract of sale of grain for future delivery on or subject to the rules of any board of trade. The second prohibition deals with the making of futures contracts

which are directly connected with interstate grain transactions. There is excepted from both of these prohibitions any such contract in which the seller is the owner or grower of the actual grain or the owner or renter of the land on which it is to be grown, or is an association of such owners, growers, or renters. The first prohibition practically forbids the transmission in interstate commerce of an order for execution on an exchange for the sale of a grain futures contract which is ordinarily purely speculative in character. It discloses that, in the judgment of Congress, the unregulated making of contracts which usually represent speculation injuriously affects the public morals and that Congress intended to assert its power, under the commerce clause, to protect to that extent the public from the evil effects of such transactions. In order to accomplish this purpose Congress withholds the use of employment of the mails from everyone and the facilities of communication in interstate commerce from persons outside of Illinois who may wish to make such a contract upon any exchange which has not been designated as a contract market and subjected itself to the regulations imposed by the Act.

May Congress deny the use of the mails and the facilities of interstate commerce for the purpose of speculation in future trading on grain exchanges? Whether a person may sell on margin a contract for future delivery of a commodity which he does not own for the sole purpose of making or trying to make

a profit upon the transaction raises a question of public policy the determination of which clearly lies within the legislative discretion. The citizen has no constitutional right to make such a transaction when it is shown that such transactions do or may injuriously affect the public interest and the legislature has prohibited the making of such transactions. The effect of such transactions and the extent thereof are matters for legislative investigation and determination. It is submitted that if in the practice of selling grain futures on a margin, even when there is a bona fide intent to buy in the actual grain for the purpose of making delivery and delivery is actually made, Congress should find as a matter of fact that such practice is prejudicial to the public interest, it could forbid the use of the mails and the facilities of interstate commerce for the transmission of orders, confirmations, and quotations in connection with them. In *Otis v. Parker*, 187 U. S. 606, this court, in sustaining a provision of the Constitution of California that "all contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void," said:

The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the first section of the Fourteenth Amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts

down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the law.

It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals is not conclusive upon the courts. * * * But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. (Pages 608-609.)

If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth v. Illinois*, 184 U. S. 425,

429. * * * Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the Fourteenth Amendment became law, as indeed they were in some civilized States. (Page 609.)

Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. (Pages 609-610.)

Undoubtedly both Congress and this Court know that those who make a large part of these futures sales do not make or intend to make delivery thereon but are merely employing the future trading facilities of the exchange for the purpose of speculating in grain, that those who buy a large part of such contracts do not want or expect delivery thereon,

and that many members of the Exchange who solicit the orders for and execute these contracts frequently know that the seller does not mean to deliver and the purchaser does not want or expect delivery thereon (pages 183, 184, and 185 of the Report of the Federal Trade Commission on the Grain Trade). Such knowledge justifies Congress in the conclusion that the future trading system operated by exchanges is employed to a very large extent by speculators merely for the purpose of betting upon price fluctuations in grain. For that reason Congress is authorized to restrain or to supervise and regulate those facilities. The great stream of speculation continuously going on in the future trading on grain exchanges clearly subject them to prohibition or regulation as the legislature may determine. The economic effect alone of such speculation would support prohibitory or regulatory legislation. The moral effect brings such transactions clearly and comprehensively within both the police power and the regulatory power under the commerce clause of the Constitution. It is a notorious fact that speculation has been and is extensively practised on the grain exchanges.

In connection with future trading this court, in the *Christie* case (198 U. S. 236), says:

It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. (Page 247.)

In the same case (125 Fed. 161) the Circuit Court of Appeals for the Eighth Circuit said:

We do not deem it necessary to set forth the details of this testimony, which can be found in the opinion of Judge Thompson in the case of the *Board of Trade of the City of Chicago v. O'Dell Commission Co.* (C. C.), 115 Fed. 574. In that case, and in *Board of Trade v. Donovan Commission Co.* (C. C.), 121 Fed. 1012, upon consideration of substantially the same evidence submitted in this case, the conclusion was reached that over 90 per cent of the transactions had on the floor of the exchange hall maintained by the Chicago Board of Trade were purely gambling transactions. (Page 168.)

In *Board of Trade v. Kinsey Company*, 130 Fed. 507, Judge Baker for the Court of Appeals said:

Undoubtedly gambling was going on in the exchange hall. (Page 513.)

The extent to which speculation is practiced in future trading on the grain exchanges is shown by the frequent employment of the "stop order" which is designed automatically to limit the trader's loss or profit prior to the maturity of the contract; by the large number of small operators, commonly known as scalpers, who habitually buy and sell grain in small quantities in the pit for quick returns; by the manner in which large speculators and scalpers avoid delivery whenever possible; by the admission in complainant's bill that members and non-members buy or sell grain for future delivery upon

the exchange for the purpose of profiting by the rise or fall of futures prices; by complainant's repeated and persistent admission that ideal functioning of the future trading machinery as an insurance or hedging facility depends upon and must have a large volume of speculative contracts, by the Federal Trade Commission's report that:

It appears that there is a large volume of future trading (on the grain exchanges) that is mere gambling and involves a great economic waste. The remedy for this lies in congressional action to prevent trading which is essentially gambling. (Page 10 of the Report on Wheat Prices for the 1920 crcp.)

And by statements from Senator Capper's speech in the United States Senate, August 9, 1921, on the provisions of the Future Trading Act:

Some of the evils in the marketing system which this bill undertakes to correct are:

- (a) Market manipulation by large operators.
- (b) Promiscuous and unrestricted speculation in foodstuffs.
- (c) Arbitrary interference with law of supply and demand.

Mr. President, it is against the law to run a gambling house anywhere within the United States. But to-day, under the cloak of business respectability, we are permitting the biggest gambling hell in the world to be operated on the Chicago Board of Trade. The grain gamblers have made the exchange building in Chicago the world's greatest gambling house.

* * *

More than 500 private-wire houses have direct connection with the Chicago Board of Trade, according to the Federal Trade Commission, and it costs \$3,000,000 a year to maintain them. Then comes the wire systems of the Chicago brokerage houses, which seek speculative business where they may. * * *

Mr. President, the small gambler in futures has no more chance to win than the small gamester in a gambling house where they use marked cards and loaded dice.

* * * You can hardly imagine the extent of the catch. Some recent instances are impressive.

One is the admitted embezzlement of \$1,187,000 by R. J. Thomson, * * *. Thomson is credited with losing a part of this huge sum in operations on the Chicago Board of Trade.

Another is the closing of the Arcola (Ill.) State Bank and the arrest of its president and cashier, father and son, for a shortage of \$400,000, due to losses in the Chicago grain pit.

* * * * *

An Omaha grain operator * * *, staked his all in the Chicago Board of Trade's gambling game and lost, then turned on the gas and died.

A widow at Topeka, Kansas, is suing to recover \$35,000 lost in grain speculation last spring.

* * * Only a few years ago, after using the money of others in market flyers, and losing it, E. A. Miller, manager of the Farmers' Elevator Co., took strychnine when exposure

came, ending his hopeless efforts to win back these losses.

Elevator managers, I am told, are particularly susceptible to the grain-gambling mania. * * * A. L. Middleton, member of a farmers' cooperative elevator company * * *, testified that so many elevator managers had gone wrong in Iowa that his company had instructed its manager not to use the "hedge," except when requested to by vote of the directors.

This country is strewn with the financial carcasses of thousands of men who have been ruined in the Chicago grain pit. I have had scores of personal letters citing most pathetic cases. The almost constant stream of suicides and embezzlements for this cause in the day's news shows that the board of trade gambling game is widespread and claims many victims yearly.

* * * The effect on the market is certainly harmful, for whether it affects the prices up or down it is an unwholesome and artificial market which is thus created.

* * * I do not want my bread any cheaper if my gain comes from the widow who has gambled away her life insurance money, or from the farmer who has gambled away the savings of a lifetime, or from the bank clerk who has gambled himself into the penitentiary.

Section 4 and Section 9 of the Act, applying to and conditionally prohibiting only the interstate features of future trading, are constitutional without reference to the determination of the question whether the

business done by the Chicago Board of Trade, or that done by its members on the board in the City of Chicago, or the State of Illinois, is inter- or intra-state commerce. Congress has sufficient power over the mails, both as sovereign and proprietor, to permit or forbid, as it sees fit, their employment for the dissemination of any information which is directly or inseparably associated with any business of which speculation is a dominant or material part.

Ex parte Jackson, 96 U. S. 727; In re Rapier, 143 U. S. 110.

In view of the salvo in Section 10 of the Act, Sections 4 and 9 should prevail without reference to the other provisions of the Act, as these sections merely cast upon complainants the duty of refraining from the practises prohibited by Section 4 altogether or to submit to the reasonable conditions imposed by Congress as a condition precedent for the privilege of using the mails and the instrumentalities of interstate commerce for the purpose of carrying on their business in other States.

JAMES M. BECK,

Solicitor General.

R. W. WILLIAMS,

Solicitor for the Department of Agriculture.

FRED LEES,

JOHN M. BURNS,

Assistants to the Solicitor.

B. T. HAINER,

Attorney, Packers and Stockyards Administration.

ILLINOIS REVISED STATUTES (CAHILL), 1921.

An act entitled "An Act to suppress bucket-shops and gambling in stocks, bonds, petroleum, cotton, grain, provisions or other produce," appears at page 1226. That act was held constitutional in *Weare Commission Co. v. People*, 209 Ill. 528.

317. (*Unlawful to keep "bucket-shop" or place for dealing in grain, etc., on margins—Penalties.*) SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly: That* it shall be unlawful for any corporation, association, copartnership or person to keep or cause to be kept within this State any bucket-shop, office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so brought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins; or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited. And any corporation or person, whether acting individually or as a member or as an officer, agent or employee of any

corporation, association or copartnership, who shall be guilty of violating this section, shall, upon conviction thereof, be fined in any sum not less than \$200 and not more than \$500; and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above prescribed, shall, upon conviction, be imprisoned in the county jail for the period of six months, and if a corporation, shall be liable to forfeiture of its charter. And the continuance of such establishment after first conviction shall be deemed a second offense. (J. & A. 3742.)

318. (*Definition of offense.*) SEC. 2. It shall not be necessary, in order to commit the offense defined in section 1 of this Act, that both the buyer and the seller shall agree to do any of the acts therein prohibited, but the said crime shall be complete against any corporation, association, copartnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, copartnership or person who shall communicate, receive, exhibit or display, in any manner, any such offer to so buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall be deemed an accessory, and, upon conviction thereof, shall be fined and punished the same as the principal and as provided in section one of this Act. (J. & A. 3743.)

319. (*Requires contracts to be made.*) SEC. 3. It shall be the duty of every commission merchant,

copartnership, association, corporation or broker doing business as such to furnish, upon demand, to any customer or principal for whom such commission merchant, broker, copartnership, corporation or association has executed any order for the actual purchase or sale of any of the commodities hereinbefore mentioned, either for immediate or future delivery, a written statement containing the names of the parties from whom such property was bought or to whom it shall have been sold, as the case may be, the time when, the place where and the price at which the same was either bought or sold; and in case such commission merchant, broker, copartnership, corporation or association shall refuse promptly to furnish such statement, upon reasonable demand, the fact of such refusal shall be *prima facie* evidence that such property was not sold or bought in a legitimate manner. (J. & A. 3744.)

320. (*Makes owner of building liable.*) SEC. 4. Whoever knowingly permits any of the illegal acts aforesaid in his building, house, or in any outhouse, booth, arbor or erection of which he has the care or possession, shall be fined not less than \$500 nor more than \$1,000; and any penalty so adjudged shall be a lien upon the premises on or in which such unlawful acts are carried on or permitted. It is the intention of this Act to prevent, punish and prohibit, within this State, the business now engaged in and conducted in places commonly known and designated as bucket-shops, and also to include the practice now commonly known as bucket-shopping by persons,

corporations, associations or copartnerships, who ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, petroleum, stocks and bonds. And it shall be the duty, under this Act, of all the judges of the several circuit courts in this State, and of the judges of the criminal court of Cook county, at every regular term thereof, to charge all regularly impaneled grand juries to make due investigation and report upon all violations of the provisions of this Act. (J. & A. 3745.)

(Ill. R. S. 1921, Ch. 38, p. 1226.)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1922

No. 701.

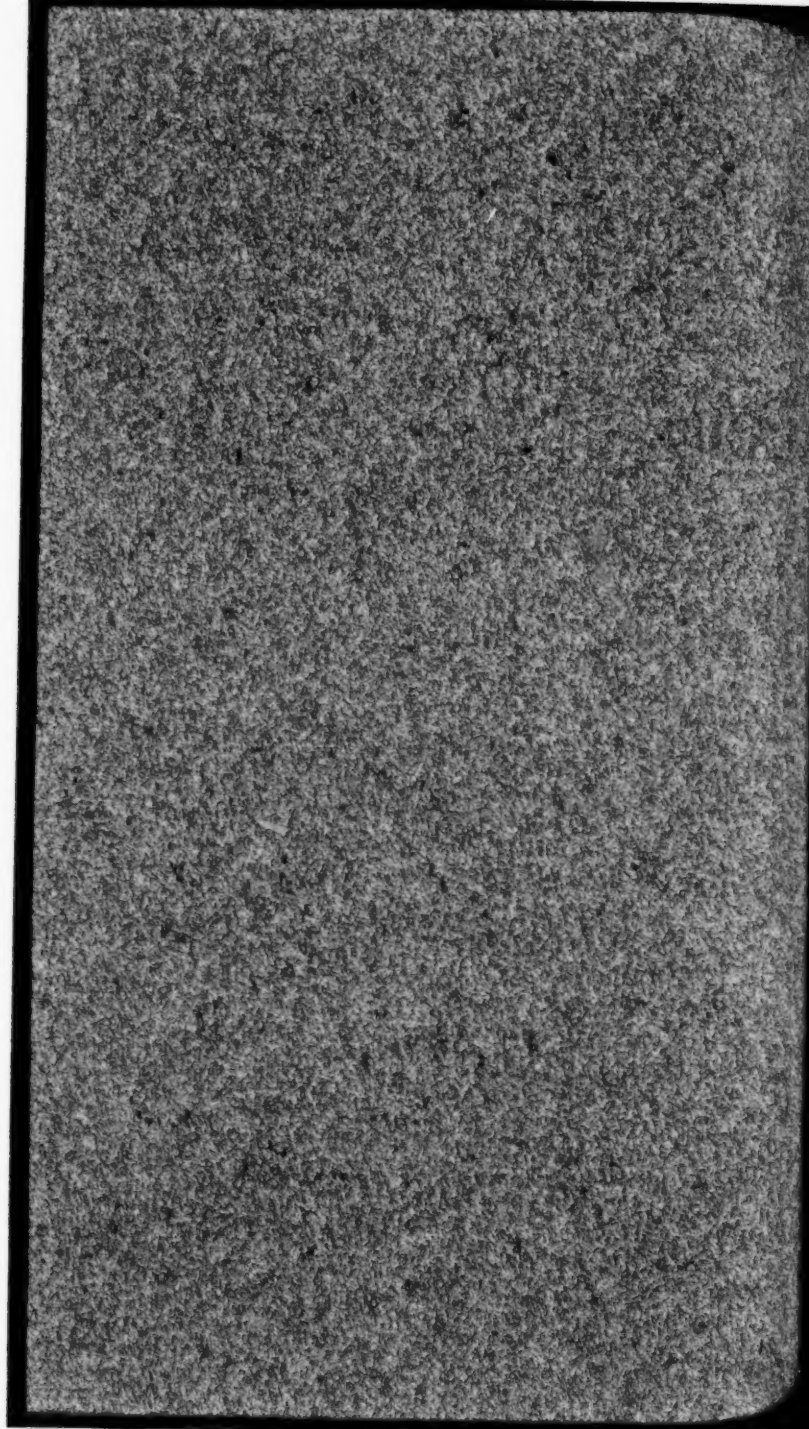
THE BOARD OF TRADE OF THE CITY OF CHICAGO
ET AL, APPELLANTS

CHARLES F. CLYNE, UNITED STATES DISTRICT
ATTORNEY ET AL, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

APPELLANTS' REPLY.

HENRY S. ROBBINS,
Counsel for Appellants.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1922.

No. 701.

THE BOARD OF TRADE OF THE CITY OF CHICAGO
ET AL., APPELLANTS.

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT
ATTORNEY ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY.

The Government has found it necessary to file two briefs—one by the Solicitor General—and another—miscalled an appendix—prepared by the Department of Agriculture. That of the Solicitor General discusses mainly the legal ques-

tions covered by our main brief and needs little in reply; that of the Department deals mainly with the economic questions.

One noticeable feature of both of these briefs is their inconsistency with the act which they seek to sustain.

The act itself (sec. 3) asserts only an economic reason for its enactment. Future trading is "affected with a national public interest;" the prices therein are used "as a basis for determining the prices" in interstate commerce; it provides to grain dealers "a means of hedging themselves against possible loss through fluctuations in price." It is to be preserved and made better by Federal bureaucratic control despite the undisputed fact that, as stated by this court in the *Christie* case, "It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn." In short, Congress recognized—as this court already had—that the great benefits accruing to the grain trade from this vast future-trading market could only be realized by the maintenance of an *open* market, to which all speculators might resort, and that it was wholly impracticable for the Exchange to censor all orders coming from the world at large to its "pits" for execution. Thus, the only alternatives are to permit, or wholly prohibit, this future trading, and Congress has adopted the first alternative as its basis for this act.

The Government's briefs—doubtless because they deem the economic ground not sufficient—appeal to the moral ground. Future trading is vicious, as they say, because it affords opportunity for undue speculation by the incompetent, and they cite many decisions—rendered before Board

of *Trade v. Christie*, 198 U. S., 236, —, in which the preponderance of the economic value of future trading was overlooked.

But has not this moral argument become inapplicable here since the *Christie* case, and because of the fact that Congress, when hard pressed for reasons for this act, confined itself to the economic reason and ignored the moral one. This is the more manifest because there is nothing in the act evincing an intention of Congress to prevent or restrict improper speculation by the incompetent. Its only aim is to restrain excessive trading by the big and competent speculators.

In enacting this act, Congress doubtless also realized that the suppression of gambling within a State belongs exclusively to its police power. Congress may aid in the suppression of gambling by denying it the use of the mails and the facilities for interstate communication; but, as pointed out in our main brief, this act discloses no such intention—probably because the farmers would be the first to resent any interruption in the prompt dissemination of the quotations by the telegraph companies—and now by a radio plant owned and operated by the Board of Trade itself.

We shall, therefore, put to one side all that is said in the Government's briefs respecting or bearing on the moral question.


The Solicitor General's brief relies on the decision in *Stafford v. Wallace* and expresses surprise that it is not mentioned in appellants' brief. But a brief seemed to be no place for the obvious. This court, when having under advisement at the same time that case and *Hill v. Wallace*, distinguished the two statutes by annulling the one, while sus-

taining the other. The distinction will be equally obvious between the Packers Act and the Grain Futures Act, which is practically the Future Trading Act with a false reason for its enactment added.

The Packers Act did not seek to regulate trading upon, or membership in, a commercial exchange. There is no future trading in live stock either upon an exchange or elsewhere and could not commercially be any. There is no segregated trading of a purely intrastate character. The stockyards involved in the *Stafford case*, were a *public* market, to which all could resort to trade; the corporation maintaining it was a public-service corporation having the right of eminent domain, while "the Board of Trade is a *private* corporation (*Stock Exchange v. Board of Trade*, 127 Ill., 161, 166; *Board of Trade v. Nelson*, 162 Ill., 438), whose charter imposes upon it *no duty to the public*. Counsel seek to extract a contrary view from some of the language used in *Stock Exchange v. Board of Trade*, *supra*; but that case only decided that the quotations had been distributed for so long a time and had become so useful to the public as to be impressed with a public use to the extent that all are entitled to them, if any get them, but that the Board may at any time cease distributing them. The Packers Act applies to a business, in which the live stock comes on the hoof to the stockyards and its packing plants and goes thence as cut meats to consumers in other States. Five big packers do the slaughtering and dominate the whole business. Their abuse of their influence and control was obvious from decisions and other proceedings. Indeed, it was largely self-confessed, for the packers did not contest the statute, but some brokers and dealers, participating in a minor way in the sale of live

stock, did attack it—not by attempting to justify the conduct of these big packers, but by claiming that their transactions were so much apart from the main business that they were improperly included in the Act; but in this they failed.

There is thus no similarity between that Act or case and this case and the Grain Futures Act. The Packers Act was justified by the existence of real, serious, and direct encroachment upon interstate commerce. The Grain Futures Act is based upon a mere pretense of a burden, which, if it were a reality, would only incidentally affect that commerce. The Packers Act deals directly with a condition of an interstate character: the Grain Futures Act attempts to regulate what is wholly intrastate.

Replying now to the brief of the Department of Agriculture—this starts with the suggestion that the judgment of Congress on this economic question should be enough for this court, but that if it is not, then this court should certainly be guided by the superior wisdom of the Department of Agriculture and disregard the views of those “theorists”—poor, misguided souls—who at the expense, and with the approval, of our great universities are wasting their lives in the study of the principles of marketing in the vain hope that they may add to the sum of useful human knowledge by bringing about a better understanding of  commerce and its laws.

This Department's brief is helpful in this respect: Appellants' main brief called attention to the fact that Prof. Seligman was right in saying that “the overwhelming weight of the evidence” produced in the hearings before the committees of Congress showed “that neither such future trading or such fluctuations in the prices of grain as do

occur therein are an obstruction to or burden upon interstate commerce in grain."

This plainly called upon the Government to show what there was in those hearings to make the judgment of Congress or of the Department of Agriculture controlling here.

The Department's brief attempts to do this. It presumably epitomizes for this court all in those hearings that is favorable to the Government's contention here. In doing so, some of its quotations contain only parts of what witness said, and the omitted parts should be read.

This brief also presumably presents all else (aside from those committee hearings)—including the economic views of the writer of the brief—which are thought to sustain the Department's position. As not a single professor of political economy is quoted as supporting the Government's contentions it may fairly be assumed that there is none such.

It is, therefore, confidently believed that, when this brief is read and compared with the conclusions of the Industrial Commission and the views of political economists quoted in appellants' appendix, and a little common sense is applied to the consideration of the circumstances surrounding, and the motive of those participating in, this future trading—this court will conclude that the claim that it constitutes a burden upon interstate commerce has no foundation in fact.

Secretary Hoover is quoted as saying that he has "the feeling," and that his "impression" is, that there have been "drives against prices," but concludes by saying that these make the fall of prices more precipitate and serve "to accelerate what will be inevitable," and that this "acceleration often works to the disadvantage of the producer." In other words, future trading (unless regulated by Congress) is a

burden upon interstate commerce, because it causes prices to reach the level warranted by the world conditions *sooner* than they otherwise would. But, as he seems not to consider, such trading often leads to an *increase* in price *sooner* than it would otherwise come, and this is a distinct benefit to the producer. This effect of future trading—which Secretary Hoover seems to deem hurtful—is regarded by all political economists (see appellants' appendix) as *beneficial*, because making fluctuations in prices *less violent and sudden* and bringing sooner to all interested a correct knowledge of actual future values.

But the price charts—which Secretary Hoover had not seen—should remove his impressions, as they removed any views of this kind the Industrial Commission may have at first entertained. (See appellants' appendix.)

To those familiar with the grain trade it will be clear that, if speculators wish to make "drives against prices" they will do so in the fall, when the heavy selling by farmers will help them to depress; but these charts in the record show no such drives, but instead a course of "orderly" marketing, in which the differences between the fall and spring prices are relatively such only, as should normally exist.

Indeed, the Industrial Commission found the fall prices more favorable to the producers "than they were before the advent of modern speculation." (See appendix thereto, p. 10.) And Prof. Wells shows (appellants' appendix, p. 39) that over a period of ten years farmers fared better by selling in the fall than they would have done by carrying through to spring.

These "impressions" about "drives against prices" are further disproved by the fact that, although future trading has

been constantly under investigation and criticism by those hostile to the exchanges, they have never been able to show that *any* person at *any* time has made such a drive, or has sold "short" with any other motive than to profit because the prevailing price seemed to him too high. (See further appellants' main brief, pp. 27-28.)

The failure of the Government's brief to appreciate the relation of the Board of Trade to the warehousing capacity in Chicago will explain why this Exchange seeks to escape the bureaucratic control, which this act contemplates. That brief says that in May, 1922, there was a sudden drop of 31 cents in wheat, because the Board of Trade put in force its emergency rule (Rec., pp. 26, 27), whereby 4,700 cars of inspected grain on track in Chicago were made conditionally deliverable. This step was taken only because the regular elevators were then all full. It enabled the owners of these carloads to sell their grain. It relieved a congested situation. It brought the price to the normal.

But the Department's brief complains because the Board of Trade does not provide more regular elevators; and this shows its misconception of conditions. The Board of Trade does not provide warehouses. Private enterprise now does that and State laws regulate them.

It is essential that every warehouse receipt deliverable in this future trading should be equally good. If one gets a receipt issued by a warehouse, from which the receipt holder must carry the grain by teams to boat or cars, it is not as valuable as one permitting delivery automatically from elevator to cars or boats. Every receipt must be from a warehouse upon the water, so that the shipper may get the lower lake-and-rail rate. Hence the Board makes "regular" only

such warehouses as are "conveniently approachable by vessel of ordinary draft and have customary shipping facilities." (Rec., p. 25.)

All such the Board of Trade welcomes; and the more the better. Indeed this exchange tried unsuccessfully to have the Illinois courts require railroads entering Chicago to provide adequate grain storage at all times, as they do depots for package freight (*People v. Illinois Central*, 233 Ill., 378). The Department of Agriculture might be more successful with Congress or the Interstate Commerce Commission.

It will thus be seen why the suggestion of that brief, that nonaccessible elevators should be included in this delivery system, may well alarm those charged with the responsibility of maintaining this great grain market.

It will be here understood that the delivery of carload lots in the "cash" business is in no way restricted.

The situation here complained of was—probably at the instance of the Department of Agriculture—made the subject of an investigation by the Federal Trade Commission under the resolution on page 18 of the Department's brief. But it made no condemning report, and could not without stultifying itself.

The Department's brief—disregarding the uncertain and varying conditions in Europe and the necessarily resultant wide fluctuations in grain prices in this country—lays hold of such fluctuations and particularly of a certain period thereof. But if this court will refer to the minority report of the House Committee on Agriculture on the bill for this Grain Futures Act, it will be seen that such fluctuations re-

sulted from inaccurate reports of the Department of Agriculture respecting crop prospects.

That brief also complains that the Chicago market at times attracts more grain than it should. This must be because it is the most favorable market for farmers to sell in; and this complaint seems inconsistent with the other complaint that the prices are unduly depressed.

The Department's brief also suggests the novel thought that, because large trust funds—by which it means funds for speculation—are drawn to Chicago, Federal supervision under the commerce power is justified. That suggestion needs no comment. Nor does the one which seeks to justify this act because prices in Chicago create a "world wide psychological effect."

That brief also deals to a certain extent with alleged facts not in the record or within the presumed knowledge of this court. We also ignore these.

That provision of the act (section 9) which punishes the circulation of false crop reports, etc., is not attacked in this suit. This Exchange disseminates no such reports. What it objects to is Sec. 5 (c), which imposes upon an Exchange the burden of preventing such false reports as a condition of its being permitted to function.

Respectfully submitted,

HENRY F. ROBBINS,
Counsel for Appellants.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1922.

BOARD OF TRADE OF THE CITY OF CHICAGO
ET AL. *v.* OLSEN, UNITED STATES ATTORNEY
FOR THE NORTHERN DISTRICT OF ILLINOIS,
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 701. Argued February 26, 1923.—Decided April 16, 1923.

1. The decision of this Court in *Hill v. Wallace*, 259 U. S. 44, holding that local dealings on boards of trade in grain for future delivery, could not constitutionally be brought under federal control by means of the taxing power, as was attempted by the Future Trading Act, is not an authority against the Grain Futures Act of September 21, 1922, c. 369, 42 Stat. 998, which is an exercise of the power to regulate interstate commerce. P. 31.
2. The flow of grain shipped into the Chicago market from other States, stored temporarily or held on cars, sold on the Chicago Board of Trade, and reshipped in large part to other States and foreign countries, is interstate commerce subject to regulation by Congress. P. 33.
3. The fact that such grain is shipped under through bills of lading from western to eastern States giving shippers the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and of changing ownership, consignee or destination, and then of continuing the shipment under the same contract at the same rate, while it does not prevent the local taxing of the grain while in Chicago, does not take it out of interstate commerce so as to deprive Congress of the power of regulation over it. P. 33. *Stafford v. Wallace*, 258 U. S. 495.

4. Neither does the fact that grain so shipped is temporarily stored in Chicago in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for continuing the shipment. P. 33. *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265.
5. Sales on the exchange of the Chicago Board of Trade are indispensable to the continuity of this flow of grain in interstate commerce. P. 36.
6. Congress having reasonably found that sales of grain for future delivery (most of which transactions do not result in actual delivery but are settled by off-setting with like contracts), are susceptible to speculation, manipulation and control, affecting cash prices and consignments of grain in such wise as to cause a direct burden on and interference with interstate commerce therein, rendering regulation imperative for the protection of such commerce and the national public interest therein,—had power to provide in the Grain Futures Act, *supra*, for placing grain boards of trade under federal supervision and regulation as “contract markets,” as a condition to dealing by their members in contracts for future delivery. P. 36.
7. The provision of the act requiring each board, so designated, to adopt a rule permitting the admission, as members, of authorized representatives of coöperative associations of producers engaged in the cash grain business, who comply, and agree to comply, with the rules of the board applicable to other members, and forbidding any rule to prevent the return of the commissions earned by such a representative, less expenses, for division among the members of his association on a *pro rata* patronage basis,—does not take the property of the members of the Chicago Board of Trade without due process of law. P. 40.
8. The Chicago Board of Trade is engaged in a business affected by a public national interest, and subject to national regulation as such. P. 40.
9. And Congress, therefore, may reasonably limit the rules governing its conduct to prevent abuses and secure freedom from undue discrimination in its operations, even if, incidentally, the value of memberships is decreased. P. 41.
10. The constitutionality of provisions of the above act forbidding use of the mails or interstate means of communication, to offer or accept sales for future delivery, except through members of boards of trade, is not here involved, since the plaintiffs are not affected by them, and, under § 10, invalidity of part of the act is not to affect the validity of the remainder. P. 42.

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Statement of the Case.

11. Section 9 of the act, declaring it to be a misdemeanor for a member of a board of trade, designated as a "contract market," to fail to evidence any contract mentioned in § 4 by a written record as therein required, is constitutional. P. 42.
12. The constitutionality of the part of § 9 providing punishment for delivering through the mails, or interstate means of communication, false or misleading crop or market reports, is not involved in this case. P. 42.
13. Neither is the constitutionality of paragraph (b) of § 6, giving the commission power to exclude from "contract markets" persons violating the act or attempting to manipulate the price of grain, in violation of § 5, or of any rule or regulation made in pursuance of its requirements. P. 43.

Affirmed.

This is an appeal from a decree of the District Court for Northern Illinois, dismissing a bill in equity. The appeal is under § 238 of the Judicial Code (as amended Act January 28, 1915, c. 22, 38 Stat. 803, 804), the case being one in which the constitutionality of the Grain Futures Act (enacted by Congress September 21, 1922, c. 369, 42 Stat. 998), is drawn in question.

The bill was brought by the Board of Trade of the City of Chicago, and a number of its members representing each class of traders on the exchange of the Board, to enjoin the United States District Attorney at Chicago, the Secretary of Agriculture, and the United States Postmaster at Chicago from taking steps to enforce the provisions of the act against them on the ground that it violates their rights under the Federal Constitution.

The purpose of the act is expressed in its title to be for the prevention of obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges and for other purposes. Its second section, par. (a), is one of definitions. Its definition of interstate commerce, in the sense of the act, is as follows: "The words 'interstate commerce' shall be construed to mean commerce between any State, Terri-

tory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia."

Paragraph (b) contains the following addition to the foregoing definition:

"(b) For the purposes of this Act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nation."

Section 3 is in the nature of a recital and finding as follows:

"Sec. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in inter-

state commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

The act in §4 forbids all persons to use mails or interstate telephone, telegraphic, wireless or other communication, in offering or accepting sales of grain for future delivery or to disseminate prices or quotations thereof, excepting the man who holds the grain he is offering for sale, and the owner or renter of land on which the grain offered for sale is to be grown; and excepting also members of boards of trade located at a terminal market on which cash sales occur in sufficient volume and under such conditions as to reflect the general value of grain and its different grades, and which have been designated by the Secretary of Agriculture as "contract markets."

The act puts these boards of trade under the supervision of the Secretary of Agriculture and imposes conditions

precedent and subsequent on his power to designate or continue them as "contract markets."

The conditions are:

(a) The keeping of a record with prescribed details of every transaction of cash and future sales of grain of the Board or its member in permanent form for three years, open to inspection of representatives of the Departments of Agriculture and of Justice.

(b) The prevention of the dissemination by the Board or any member of misleading prices.

(c) The prevention of manipulation of prices or the cornering of grain by the dealers or operators on the Board.

(d) The adoption of a rule permitting the admission as members of authorized representatives of lawfully formed coöperative associations of producers having adequate responsibility engaged in the cash grain business, complying with and agreeing to comply with, the rules of the Board applicable to other members, provided that no rule shall prevent the return to its members on a *pro rata* patronage basis the money collected by such association in the business, less expenses.

The Secretary of Agriculture, the Secretary of Commerce and the Attorney General are made a commission to hear and determine, after due notice, whether any board of trade has failed or is failing by rule to do the things required above, and, if found in default, to suspend its functions as a contract market for a period not to exceed six months, or to revoke its designation as such, with an appeal on the record to the Circuit Court of Appeals within the circuit where the board is situate. Such Commission, too, is to hear appeals from the Secretary's action in refusing to designate any board of trade as a contract market.

There is a further provision for excluding from all contract markets and trading privileges any person violating

the provisions of the act or the regulations in pursuance thereof.

Section 9 declares anyone trading in futures in violation of § 4 or sending intentionally or carelessly, false or misleading quotations or information as to the prices of grain, guilty of a misdemeanor.

The bill of the plaintiffs describes the organization of the Chicago Board of Trade as a corporation under a special act of the Legislature of Illinois, passed in 1859, with a membership of 1600 and a board of eighteen directors, of whom one is president. It avers that the Board does no business in selling or buying grain, but only furnishes an exchange and offices where such business can be done by its members; that it does not deliver any market quotation through interstate means, but it does cause to be collected the first price and each change of price on its exchange in cash and future sales during the regular hours in the exchange hall and delivers them to certain telegraph companies, who pay the Board for this information.

The bill further avers that it is sustained only by the initiation fees and dues of its members, the former being \$25,000, for each member, and the latter being in the form of annual assessments, that it has from these sources accumulated funds with which to provide a large building and offices for the exchange, from some of which it receives rental and so has property worth two millions of dollars or more; that its existence depends on keeping its memberships valuable; that it does this by requiring character and financial responsibility as qualifications for its membership and by a requirement that a member shall charge for every sale a fixed minimum commission to a non-member principal, and a less minimum to a member who shall be his principal; that corporations are not permitted to be members, but that when two of the stockholders and officers are members, the corporation

is permitted as a member to make contracts on the exchange. The bill further avers that if the Board were required to admit representatives of coöperative associations of producers with the privilege of dividing with their members the proceeds of commissions less expenses, it would greatly impair the value of its memberships to other members.

The bill further avers that the members of its exchange engage only in three kinds of trading. (1) Many act as commission merchants and receive from producers and country grain dealers grain in cars and boats consigned to them which as agents they sell for immediate delivery and account to their principals for the proceeds of such sales less their commissions and other expenses, and many members as principals or agents purchase and sell grain in Chicago which is in cars or elevators for immediate delivery, and all of these transactions are known as "cash trades."

(2) Many members send out in the afternoons whenever market conditions are favorable, telegrams or letters to country grain dealers offering to buy grain, or to millers and other non-residents of Chicago, probable buyers, offering to sell grain at released prices and to be shipped within a certain time on condition that these offers be accepted before regular market hours the next morning. These are known as "cash sales for deferred shipment", or as "sales to arrive."

(3) Many of the members engage either as principals or agents in making on the exchange contracts with other members for the purchase and sale of grain for future delivery by which the seller agrees to deliver in Chicago the grain covered by the contract upon any day of the named month that he shall select. More than 75 per cent. of the volume of all trading in the exchange is for future delivery and under the rules it must be done in the exchange hall and between regular fixed hours; that both buyers

and sellers in all such contracts are personally present when the contracts are made.

The bill further avers that all contracts for future delivery are under the rules of the Board fulfilled only by delivery of warehouse receipts for the grain issued by twelve warehouses in Chicago, selected by the Board and having a capacity of 13 million bushels and licensed by the State of Illinois to do a public warehouse business; that the grain is mixed with other grain so that the receipt holder never gets the grain deposited when the receipt was issued; that while a rule of the exchange makes grain in railroad cars deliverable in future cars the last three days of the month, the transaction is not fully completed till the grain in those cars is deposited in a regular warehouse and receipt issued; that in the trading for future delivery more than three-quarters of the many millions of bushels contracted to be delivered are settled for without delivery by offsetting purchases; that a large part of the future trading is done by grain merchants, millers and others only for the purpose of insuring themselves against price fluctuations in respect of like grain owned by them and held for sale, shipment or manufacture and is settled by offsetting.

The bill further avers that another large part of future trading is done by speculators, so-called, who make a study of market conditions affecting prices, and try to profit by their judgment as to future prices; that few of such speculators have capital enough to make large single purchases in any way affecting the market; that six-sevenths of all the trading in futures in the country take place in Chicago; that no corners have been run on the exchange for fifteen years, due to the enforcement of rules against them by the Board and "perhaps to the Sherman Anti-Trust Act;" that manipulation has never been successfully resorted to to depress prices; that the selling of futures has no such effect; that the law of sup-

ply and demand regulates prices and prevents violent fluctuations, and that before hedging was made possible by this future trading the cost of the middleman between producer and consumer was much greater.

The defendants filed an answer admitting much of the bill but specifically denying the averments included in the last foregoing paragraph.

The plaintiffs submitted a large number of affidavits in support of a motion for a temporary injunction. These contained opinions of many professors of political economy in the colleges of the country to the effect that trading in futures in the long run did not depress prices, but stabilized them.

The court denied the motion for a temporary injunction and of its own motion dismissed the bill for want of equity.

The conclusions of Congress expressed in the recital of § 3 as to the detriment to interstate commerce from constantly recurring manipulation of sales for future delivery were reached after many years of investigation and examination of witnesses, including the advocates of regulation and those opposed, and men intimately advised in respect to the grain markets of the country.

The Senate Committee on Agriculture and Forestry reported to the Senate as follows:

"Every member of a grain exchange who testified before this committee acknowledged that there is at times excessive speculation and undesirable speculation in the futures market. Furthermore, it was brought out that a few big traders at times influence prices—manipulate the market—by the great volume of their operations. Also, it was shown that a continually fluctuating, and not a stable, market is the desire of speculators. Such a market is against the interests of the producer; he must have stable prices in order to market his crops to best advantage. A market without wide and frequent price fluctuations

would greatly benefit the producer. The reason for this is that rapidly fluctuating prices can not be fully reflected in the prices paid at country stations, so an additional margin must be allowed when buying in the country." Sen. Rep. No. 212, 67th Cong., 1st sess.

Witnesses testified before the Committee that a calculation based on commissions showed the total bushels of grain sold for future delivery on the Chicago Board of Trade in a year reach nearly twenty billions and that the amount of grain actually delivered under such contracts is not one per cent. of this. Objectors to future trading insisted at first that future trading put in the hands of desperate speculators an easy opportunity to corner the market and to promote great and rapid fluctuations in value and was wholly vicious and should be forbidden. Further investigation and consideration have satisfied many that the law of supply and demand operated on futures as on cash sales and that futures are very useful in certain respects; notably in offering a means by which through "hedging," owners of grain can, to some extent, protect themselves against the danger of losses by fluctuation.

The Government did not, in this hearing and argument, maintain that by manipulation the operators can permanently depress the prices of grain but cited the actual quotations from time to time, some as late as the summer of 1922, showing violent fluctuations through "deals" of large operators engaged in manipulating the futures market at intervals since 1900, before which corners were ever recurring but since which they have been infrequent. Much evidence was adduced before congressional committees that the sales of futures on the Chicago Board dominated the prices of wheat in this country and the world. The injurious effect of these recurring fluctuations in such futures upon the consignment of grain by owners and producers was asserted by witnesses. Mr.

Herbert Hoover, whose experience as Food Administrator gave his opinion weight, said to the House Committee on Agriculture (Future Trading Hearings—66th Cong. 3d sess., p. 909-910):

"The second form of manipulation and the one that I feel does at times take place, is the making of a drive on the price by either the sale or the purchase of such quantities as will affect the price by the volume of material coming to the market at that particular time. I would regard those transactions as an attempt to dislocate the normal flow of the law of supply and demand, and any attempt of any individual to dislocate a free market must be against public interest. I feel it is also against the interest of the individual producer, because a drive on the market that depresses the price must find a considerable number of farmers who, through the fall in price and their outstanding obligations, are compelled to liquidate, and they have been done an injury. Incidentally, the commodity has been brought into the market, and an acceleration to depression has been created."

Mr. Julius H. Barnes, the head of the United States Grain Corporation during the War, and of widest experience in the grain markets of the world, at the same hearing, after explaining that future dealing stabilizes prices and helps legitimate hedging and that a drive on prices worked its own cure in the long run, as did the distinguished economists whose affidavits were exhibited in this case, said (pp. 839-840):

"But it is also true that even though such a price depression must be temporary in character it may, during its period of effectiveness, do substantial injustice by forcing the liquidation of grain held on margins, or by the price tendency thus displayed frightening owners otherwise confident of the ultimate value of their goods."

The Federal Trade Commission in its report on wheat prices to the President, December 13, 1920, said, p. 8:

"Prices of wheat futures, the decline in which has been especially the subject of criticism, are susceptible of manipulation. Wide fluctuations in prices and large discounts of the future price below the cash price have prevailed. This has made it unsatisfactory for 'hedging,' and hedging sales may also appear to be manipulative, because, if they are large, they may cause sharp depressions. Wheat futures are not functioning well, even according to the standards of their advocates."

Mr. Julius H. Barnes, in his evidence before the Federal Trade Commission, in October, 1922, describes the effect upon interstate commerce of a "deal" in May, 1922, wheat on the Chicago Board of Trade, when the price of futures rose rapidly. Large operators collected cash wheat all over the country and headed it for Chicago for delivery at the attractive prices. This took wheat away from all the other wheat centers of the country where it normally would have remained for consumption and accumulated an almost unsalable quantity in Chicago, greatly disturbing the normal and useful flow of wheat in its ordinary and proper distribution and precipitating a crash in prices.¹

¹ In response to Senate Resolution 133 the Federal Trade Commission prepared to make a report by conducting in October, 1922, an inquiry into the market manipulation of grain. Mr. Julius H. Barnes was a witness, and in the course of his examination said (pp. 74-76):

"Now, in May, 1922, we had the same spectacular gyrations in prices, starting earlier in the month and falling into a complete collapse in price. Why?

"COMMISSIONER MURDOCK: In the middle of the month this time?

"MR. BARNES: Yes, starting early in the month, rising to a peak and then falling to an early collapse. Without knowing the facts, because these things are detected by commission merchants, it seems quite clear that there were two or three large lines of wheat bought in Chicago for delivery in May 1922; that at least one of those, on popular report, was a man who could easily pay for five million bushels of wheat; that he intended to take the wheat as a merchant;

It was charged before the congressional committees that the limitation of deliveries under contracts for futures to warehouse receipts of twelve regular warehouses aggregating but thirteen million bushels capacity, with the privilege of a tender of grain in cars on the last three days of the delivery month and a power in the board of directors to enlarge the privilege in case of an emergency, casts another element of speculative doubt into the prices of futures and puts too much control in the board of directors. In view of the fact that the total capacity of Chicago for storing grain in public and private warehouses is forty-five millions, it is urged that this rule of the futures market is sinister and dangerous in affecting the prices of a market that are world-wide in their influence by such a narrow limitation of deliveries subject to

that he was going to pay cash for it and not squeeze somebody to make a settlement. He expected to get delivery of that, did not buy it in anticipation that it could not be delivered; and therefore he could force a settlement, and he was going to act as a merchant on the belief that wheat was worth more in the world's markets than the prices then ruling in Chicago; but on top of that there developed that two or three other men, who were evidently clear speculators, not acting with that conception, had also lines of wheat, and the aggregate of those made a shortage in Chicago exceeding the stock of wheat in Chicago or naturally tributary thereto.

"The result of that was that as this situation developed, the buyer, miller or exporter began to get afraid about the Chicago market, that he might have to buy his hedges in higher, and began to buy in those hedges and the market advanced under that kind of apprehensive buying, the buying of legitimate merchants who were frightened to leave their hedges in that month any longer. That helped make the peak, plus perhaps some buying by interested people who wanted to see the price marked up, and those large cash interests in Chicago began to collect all over the country wheat and head it to Chicago for delivery at these attractive prices, which by this time had reached a relation in respect to all of the markets which attracted wheat from every direction to Chicago.

"The result of that was that by the end of the month there was accumulated in Chicago a stock of ten or twelve million bushels of

arbitrary and uncertain change at the discretion of the Board, and that it is a factor in frightening shippers and lawful hedgers in making opportunity for speculative manipulation and burdening the flow of grain in normal interstate channels.²

wheat, which was beyond the normal absorbing capacity of the consumption trade that rests on Chicago, and that wheat had been lifted by the incentive of these apprehensively made prices from centers where it should have remained for the consumption which normally overtakes it from those centers—Omaha, Kansas City, Minneapolis, all these other points. So that the country stocks which should normally supply mills west of Chicago or south of Chicago were lifted out of their natural place and directed to Chicago by these apprehensively made prices, and there was collected in Chicago an almost unsalable quantity of wheat which could only press in one direction, could not go back.

"COMMISSIONER MURDOCK: So that we had a price collapse by that?"

See also letter of J. H. Barnes to Chicago Board of Trade, p. 69, Grain Futures Hearings before Committee on Agriculture and Forestry, U. S. Senate, 67th Cong., 2d sess., on H. R. 11843, containing the following:

"Present conditions lay an economic burden on distribution cost by drawing wheat to Chicago out of its accustomed channels and from points of supply needed shortly for actual consumption elsewhere. These evil effects are solely from apprehension of a forced settlement at artificial prices on hedges properly used as insurance against price level fluctuations."

"Evidence of Julius H. Barnes before Federal Trade Commission in October, 1922 (p. 77), on inquiry in response to Senate Res. No. 133:

"MR. BARNES: In the demonstration for several years that the chief abuses of the trade were deliberate manipulation and congestion, the deliberate forcing of settlement by artificial prices, the trade step by step tried to make it more difficult for anyone to obtain that control of the market. They made No. 1, 2, 3 wheat, and on all varieties deliverable. That was not sufficient, as demonstrated in Chicago two years ago to the Market Committee of 1917. I suggested to them that the trade ought to seriously consider a widening of the contract basis once more, so as to make wheat at Omaha and Kansas City and Minneapolis, at points of accumulation on the normal

Mr. Henry S. Robbins for appellants.

I. This case should be reversed with directions for a decree for appellants upon the authority of *Hill v. Wallace*, 259 U. S. 44.

The new act (§ 3) presents no reasons that were not before this Court on the former hearing. The provisions of the law, which are material here, are the same. The reasons of Congress for their enactment are the same, and in both cases are brought to the attention of this Court.

flow. So that there was not any substantial injustice done a buyer; deliverable at a freight cost difference and a small penalty, so that it would not be abused, and I stand to-day for that as being the one real constructive thing left for the Chicago market to-day, if Chicago is to be the liquid grain future trading market of America, as it should be, if there is a natural advantage in concentrating all the trading of the country in one market, so that you can send an order through and get one hundred thousand or five hundred thousand bushels in a minute, to answer a cable from abroad or a milling order, because the volume of trade there is liquid all the time, and I believe that is in the public interest.

"If it is to do that, then Chicago ought to widen this wedge against these shippers, and it can be done by taking into contract delivery the wheats in these other markets. The effect last May would have been that that wheat would have been delivered, but the wheat itself would have physically been in Omaha and Kansas City and available for milling in June and July, when it was needed, and it would not have been in Chicago to press direct on the east and the world's market and cause a further decline in price.

"MR. WATKINS: Mr. Barnes, what you would include for delivery at Chicago markets you would include for delivery at Seaboard markets, would you not?

"MR. BARNES: No, I would not, because as I say, on the natural flow, a buyer in Chicago for actual delivery of wheat must in the normal process of trade move that wheat east. His consumption both for export and milling is east of Chicago. Therefore, for him to take delivery west of Chicago at a freight difference and a small penalty is no substantial injustice; but to force him to take wheat at the Seaboard at the transportation cost when maybe he is buying in Chicago to supply a mill in Omaha, might be a very substantial injustice."

If there is a distinction broad enough to escape the effect of the former decision, it must lie in the fact that the reasons of Congress are now recited in the act, while in the former case this Court had them from the records of Congress. Such a distinction must rest either on the ground that the recitals in a statute of the reasons of Congress for passing it become conclusive upon the Court, when it is passing upon the constitutionality of the act, or that this Court can fully appraise the reasons of Congress only when they are incorporated into the act.

We do not stop to consider whether the technical doctrine of estoppel is here applicable; nor whether the doctrine of *stare decisis* is applicable to constitutional questions, because in any event *Hill v. Wallace* must, so far as applicable, control the decision of this case, unless this Court shall conclude—what we may not assume—that it made a mistake in that case, and should now recede from that decision.

II. Future trading on the exchanges does not impose a burden upon interstate commerce. The contrary of this proposition constitutes the key of the arch upon which this law rests. Without it the act clearly falls within the decision in *Hill v. Wallace*.

The recitals of § 3 are not conclusive of this question.

When the existence of constitutional power depends on a certain fact or condition, this Court must for itself determine whether that fact or condition really exists. *Matter of Jacobs*, 98 N. Y. 110; *Harston v. Danville & Western Ry. Co.*, 208 U. S. 598, 606; *Hill v. Wallace*, *supra*; *Child Labor Tax Case*, 259 U. S. 20.

How then is the existence of this essential fact or condition to be ascertained—by the usual legal method of allegation and proof, or by such knowledge as this Court is presumed to have?

If the former, then upon this record such obstacle or burden to interstate commerce does not exist; for the bill

so alleges, and the case is here upon a demurrer to the bill sustained for want of equity.

But as after all this is a question of economic or trade law, which must be resolved more as a matter of expert opinion than by direct proof, it would seem to be a question which this Court could decide upon its own present knowledge of the subject, supplemented by such resort to the writings of trained minds as it shall find necessary.

Starting with the proposition that the price fluctuations under consideration are such as are created in sales for future delivery on an exchange, which "are not in and of themselves interstate commerce," such prejudicial effect, if any, as these fluctuations may have upon this future trading—which is purely intrastate commerce—or those participating in it, must be put to one side.

Our inquiry is to be confined to the effect of these future price fluctuations on such cash sales—including sales "of cash grain for deferred shipment or delivery"—as are interstate commerce.

We should here start with a clear conception that the prices in these future sales do not fix or determine the prices in cash sales in either intrastate or interstate commerce. The cash price and the future price in the same market will never—or at least only by a rare chance—be the same, except in the delivery month of the future contract when further trading for delivery in that month usually ceases except for the closing of existing contracts.

The cost of carrying the grain from the present time to the future delivery date constitutes one normal element of difference between the "cash" price and the price in the futures. So when the future sales contemplate delivery in a month of the next crop year the cash and future prices have no fixed relation to each other because dependent upon different supply conditions.

True, the cash prices will not continue below the level determined by a deduction from the future price equal

to the normal cost of carrying the actual grain until the delivery month; for whenever cash wheat thus falls speculators quickly take advantage of it by buying the cash and selling the future. But the cash price may be, and frequently is, relatively higher than the future price because of some urgent immediate demand of millers or exporters or other reason.

So too, there is nothing to compel those who make interstate sales or purchases of grain, to accept as their price the future price or any fixed departure from it. Two persons engage in a cash transaction in grain only when both minds agree upon what the price should be, and this occurs only when each is satisfied to join in a trade at that price. It is, in other words, a price voluntarily arrived at. What is true of an individual sale is equally true of all the sales which go to make up interstate commerce.

Doubtless the quotations of prices in future trading constitute a part, and often an important part, of the information upon which the minds of seller and buyer act in agreeing upon their price. But the shipper of grain across state lines will be more influenced by the prices of "cash" grain in his accessible markets, which are seldom actually, and often not relatively, the same as the future prices.

We must first ascertain the test or standard by which to determine whether these price fluctuations in intrastate commerce are a burden upon interstate commerce. Nothing may be regarded as a burden upon commerce, which does not prejudicially affect those engaged in it or the public generally. If this country exported all the grains that it raises, it might be said that whatever tends to raise the price is beneficial rather than hurtful, and only such conduct or influences as tended to depress prices should be regarded as a burden upon commerce. But this country consumes the major part of its own grains,

and this Court has determined in *United States v. Patten*, 226 U. S. 525, that a conspiracy of persons to run a "corner" and thereby increase prices is so harmful to the public as to be within the Sherman Anti-Trust Act.

Hence, what the law contemplates is the free and unrestricted play of the natural law of supply and demand. Only such conduct or influences, therefore, as cause prices in interstate commerce to be other than such as would result from this natural law, are to be here considered in ascertaining what are burdens upon that commerce.

This burden may arise, either because such prices are raised above, or depressed below, the normal price. The former could result—if at all—only from the excessive buying of speculators who aim to "corner" the markets and thereby force short sellers to settle at a price above the natural price. But "corners" in the grain market are "a thing of the past."

The question is thus reduced to, whether the fluctuations in this future trading are such as to abnormally depress the price of "cash" grain in interstate commerce to the prejudice of the producers.

The bill avers and the evidence in the *Christie Case*, 198 U. S. 236, showed that the grain buyers' profit in moving grain from the farmers to the foreign market—which formerly was from five to eight cents a bushel—had been reduced to not exceeding two cents a bushel by the opportunity afforded by future trading to the grain dealers to insure themselves against price fluctuations by the making of "hedging" contracts.

Theories respecting speculative trading in grain, which in the past have been deemed by legislators to be economic truths and been made the basis of restrictive legislation, are now conceded to be economic fallacies. No thoughtful person now contends that on economic grounds public injury results from speculation in grain, or that all future trading on the grain exchanges should be suppressed.

All that the proponents of this legislation now claim is that "sudden or unreasonable fluctuations in prices" in future trading "frequently occur as the result of speculation, manipulation or control," and that a depression of prices which results therefrom is "detrimental to the producers or consumers," and hence is a burden upon interstate commerce.

The short-seller's only motive is to profit by correctly forecasting the price, at which grain will sell at a future day. He is ever conscious that there are others at hand, who are actuated by a like motive to profit by buying, when the market price is such as to promise profit.

Before one can sell he must find some other member of the exchange who, or whose customer, takes a directly opposite view of the probable future price; the quantity bought equals the quantity sold. It is these conflicting views of many traders, which make the market. Thus future trading but expresses the attempts of all participants therein to profit by correctly forecasting the future price. Each is acting under the highest incentive to be right, because of the severe loss that will result from being wrong. They all know that the ultimate factor is the law of supply and demand, as affected by the market conditions when the delivery time arrives. Their sole aim is to correctly appraise the effect of such conditions upon the operation of that law.

The claim asserted in § 3 of the Grain Futures Act, that sudden or unreasonable fluctuations in prices frequently occur as the result of speculation, manipulation or control, in future trading, and constitute a burden upon interstate commerce, is negated by the writings of economists and by the affidavits of twenty or more professors of political economy in our leading universities, which form part of this record.

Concurrence of view in the minds of those, who are best qualified to know, clearly establishes (1) that future

trading has not produced sudden or unreasonable fluctuations in prices; (2) that such fluctuations do not frequently occur as the result of speculation, manipulation or control; and (3) that such fluctuations as do occur in future trading are not detrimental to the producers or consumers, or a burden upon interstate commerce. Furthermore, there was nothing in the hearings before the committees of Congress preceding the passage of this and the former act to justify these recitals in § 3 of the act.

Whatever is intrastate in character must, in order to be a burden upon interstate commerce, (1) directly touch or affect such commerce, and (2) affect it in a substantially injurious way. In other words, it must be a direct and onerous burden upon such commerce. *Passenger Cases*, 7 How. 402; *Hopkins v. United States*, 171 U. S. 578; *Adair v. United States*, 208 U. S. 161; *Hooper v. California*, 155 U. S. 648; *Smith v. Maryland*, 18 How. 71; *Blumenstock Bros. v. Curtis Publishing Co.*, 252 U. S. 436; *Bradnox v. Missouri*, 219 U. S. 285; *Merchants Exchange v. Missouri*, 248 U. S. 365; *Field v. Barber Asphalt Co.*, 194 U. S. 618.

Does this intrastate future trading thus burden interstate commerce? Considered in its entirety, no one claims that it does. All concede that future trading is distinctly helpful to commerce.

All that is claimed by the proponents of this legislation is, that the prices made in this future trading at times prejudicially depress prices in interstate transactions in grain. It has already been shown that this is a false premise.

But assuming it to be a true one, can it be said that such intrastate prices so directly and materially affect interstate prices as to constitute a burden on interstate commerce? As we have already seen, interstate traders in grain are not obliged to accept, nor do in fact accept, these intrastate prices as the prices in their interstate

transactions. They constitute but a part of the information upon which such traders act in agreeing upon their prices. If Congress may justify interference with this purely intrastate trading upon the theory of protecting the normal play of the law of supply and demand as respects grain, it may upon the same grounds regulate the numerous exchanges where stocks, eggs, butter and other produce are dealt in, and whose prices are quoted in the daily press. Thus is presented the question, whether purely intrastate trading becomes subject to the commerce power of Congress merely because it frequently indirectly affects prices in interstate commerce. But there can be no distinction between intrastate *prices* and anything else of an intrastate character, which affects interstate prices. In other words, the question here is, whether every intrastate employment, business, or condition is within the commerce power of Congress, if it in any way affects prices in interstate commerce.

If so, then this Court was wrong in adjudging unconstitutional the first Child Labor Law. If the protection of prices in interstate commerce is to be held to justify the exercise of the interstate commerce power, that power will be enlarged far beyond any present conceptions of it. Wages of labor employed in manufacture and other elements of manufacture materially affect the prices of such manufactured products as subsequently enter into interstate commerce. Is the commerce power broad enough to regulate labor employed in, and other features of, manufacture? This Court in *United States v. Knight Co.*, 156 U. S. 1, 17, stated that combinations which raise or lower prices or wages in domestic enterprise only indirectly affect interstate commerce. See also *Railroad Co. v. Richmond*, 19 Wall. 584.

We do not here contend that Congress may not treat as an obstruction to commerce persons who combine for the purpose of directly fixing or affecting prices in interstate commerce (as in the *Addyston Pipe Case*, 175 U. S.

211; the *Swift Case*, 196 U. S. 375, and the *Patten Case*, 226 U. S. 525), but only that acts which may directly influence prices in intrastate trading in grain for future delivery can only indirectly affect, if at all, the interstate buying and selling of grain for immediate delivery; and that such acts are, therefore, beyond the commerce power of Congress.

III. The present act is not one to remove an alleged burden upon interstate commerce.

If the condition or subject-matter be partly of an interstate and partly of an intrastate character the commerce power will be judicially confined to that which is interstate. *Trade-Mark Cases*, 100 U. S. 82.

The only qualification to this principle is found where there is such an intermingling that that which is interstate cannot be protected or regulated without also touching that which is intrastate, *Minnesota Rate Cases*, 230 U. S. 354; *Houston, East & West Texas Ry. Co. v. United States*, 234 U. S. 342; and here the federal power is limited to the removal of the obstruction. *Illinois Central R. R. Co. v. Public Utilities Commission*, 243 U. S. 493.

Still another phase of the question is presented where the condition or subject matter is wholly within intrastate commerce, but it gives rise to certain incidents or opportunities, which enable evilly disposed persons so to act as to create an obstacle to or burden upon interstate commerce. The commerce power here should—if the spirit of the Constitution is not to be violated—be confined to measures directly aimed at the obstacle and those who create it. Congress may not use such obstacle as a pretext for absorbing complete control of such intrastate commerce in respect to things and persons in no way responsible for the supposed obstacle or burden. The present case falls within this last phase of the question.

Again Congress may not compel a trade agency created by a State and not itself participating in the offense—

as a condition of its continuing to participate in purely intrastate commerce—to actively assist the Nation in the enforcement of its laws—that is, become the police officer or the criminal court of the General Government.

The obstacle here claimed is overtrading which prejudices prices in interstate commerce in grain. The grain exchanges never trade at all: they merely maintain halls where others trade. The great majority of the members of exchanges are not guilty of overtrading.

The Grain Futures Act does not, in the section (9) which provides for the enforcement of the act through the criminal courts, include as an offense manipulation or overtrading. The act, however, does in fact, in § 6, make an attempt to manipulate a crime. When this is ascertained by the commission which the act creates, the offending person is punished by being deprived of the right to trade on any exchange—which may be his only vocation—and the exchange is required to coöperate in imposing this punishment, as a condition to the exercise of its right to conduct its purely intrastate business. Thus the exchange—which is not guilty of manipulation or overtrading—is punished by this law by being restricted in its right to pursue a lawful business.

The act is, therefore, not one to remove an obstruction to commerce, because it does not adopt the only appropriate means for doing so—a statute aimed at those who create the obstacle. See *United States v. Dewitt*, 9 Wall. 41, where this Court held that Congress could not prohibit the making of some oils in order to increase the production of others that it taxed.

IV. The removal of an obstruction to interstate commerce is a mere pretext, under which Congress seeks to regulate what is exclusively intrastate commerce.

V. The Grain Futures Act conflicts with the legislative discretion of the States respecting their intrastate commerce, and is in itself a burden upon that commerce.

VI. The act cannot be sustained under the power of Congress to establish post offices, or under its control of interstate communication by telegraph or telephone.

The purpose in this connection is not to exclude from such avenues of communication a message or letter or quotation that is false or obscene or fraudulent in itself or will promote fraud or other illegal conduct.

It is to compel the exchange to accept designation as a contract market by denying its members, if the exchange refuses so to qualify, the privilege of communicating with their customers through the mails or by interstate telegram or telephone. The prohibition is in the nature of a penalty. It is one of the enforcing provisions of the act. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288; *Burton v. United States*, 202 U. S. 344, 371; *Hoover v. McChesney*, 81 Fed. 472; *Western Union Tel. Co. v. Foster*, 247 U. S. 114; *Hammer v. Dagenhart*, 247 U. S. 251.

VII. The insurance feature.

Section 3 of the act recites that future contracts are utilized by shippers and dealers engaged in interstate commerce "as a means of hedging themselves against possible loss through fluctuations in price."

Section 4 of the act makes it unlawful for any person to make a contract of sale upon an exchange "which is or may be used for hedging any transactions in interstate commerce in grain," except it be made through a member of a "contract market."

These provisions seem to be based upon the theory that, because those who ship grain in interstate commerce resort to future trading to get insurance, future trading is thereby subject to the interstate commerce power.

But this Court has held that the business of insurance is not commerce, nor an instrumentality of commerce, but a mere incident thereto.

VIII. The provision of the act, § 5 (e), requiring exchanges to admit to membership representatives of co-operative associations of producers, and sanctioning "patronage dividends," deprives the Board of Trade and its members of their property without due process of law.

This identical provision was in the Future Trading Act, and was by this Court held to be not within the commerce power of Congress. The reasons alleged for reënacting some of the provisions of the former act, and which are thought to justify the new act, have no application to this particular provision. But this provision is also unconstitutional upon the further ground that it violates the due process provision of the Constitution.

It has never been held, even as respects modern common carriers, that any person could be legislated into a position where he might share with the owners the profits accruing from the use of their property in public service.

The power to impress property with a public use is, as respects a State, "an exercise of the police power of the State." *Budd v. New York*, 143 U. S. 545; *Lawton v. Steele*, 152 U. S. 133-137.

Congress may exercise such power only so far as it is included in the other powers conferred on it by the Constitution. *Hamilton v. Kentucky Distilleries*, 251 U. S. 146; *United States v. Cruikshank*, 92 U. S. 542; *Tennessee v. Davis*, 100 U. S. 257.

Again, this power, as respects any particular object, must reside exclusively either in the State or in Congress; it cannot well reside in both without producing conflicting statutes.

The property of this Board is situated in Illinois, the Board transacts no business upon its property, and the business that it permits its members to transact thereon is mostly of a domestic and local, as distinguished from an interstate, character; and it seems that the power to impress this property with a public use ought to belong to the State of Illinois alone.

Again, this section 5 (e) is in no sense a proper exercise of the power. In all cases where the property involved is privately owned, the only interest therein that a statute may grant to the public (without paying for the property) is the right of all to share in the service it renders on fair and common terms.

This section is not for the benefit of the public generally, but only a certain class—farmers' organizations.

What the Grain Futures Act does is to force agents of farmers' organizations into membership in the exchanges, so that all farmers who join coöperative associations may escape the payment of the commissions—which all others must pay—and thereby indirectly share in the profit which accrues from the rendering of the service—a profit which has resulted to the members of the exchanges from the creation and maintenance for many years (at private expense of money and effort) of these instrumentalities of trade.

This instrumentality or privately owned property, and the profit accruing from its use, like the grain elevator or insurance company, and the profit therefrom, belong to those who have created and own it.

Any statute which takes private property for a private purpose—as well as one which takes property for a public use without the payment of adequate consideration—violates the due process clause of the Fifth or Fourteenth Amendments to the Constitution. *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403; *Missouri, etc., Ry. Co. v. Nebraska*, 217 U. S. 196; *Chicago, Mil. & St. P. Ry. Co. v. Wisconsin*, 238 U. S. 491; *Eubank v. Richmond*, 226 U. S. 137; *Cole v. La Grange*, 113 U. S. 1.

The Fifth Amendment applies to an intangible right as well as to tangible property. *Monongahela Co. v. United States*, 148 U. S. 312, 343; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 253.

Again, any statute which materially impairs the value or profitable use of private property is as much a taking

within the due process provision as the actual appropriation of it. *Peabody v. United States*, 231 U. S. 530; *Filor v. United States*, 9 Wall. 45, 49.

Indeed, a pecuniary loss need not be shown. If the right of property is invaded, the statute is within the constitutional provision. *Buchanan v. Warley*, 245 U. S. 60, 74.

IX. Section 6 of the act violates the due process of law provision of the Constitution.

This section provides that any person who "is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements," shall upon the complaint of the Secretary of Agriculture be tried before a commission consisting of such Secretary and two other cabinet officers (all of whom are appointed by, and hold office during the will of, the President), and if found guilty, the commission may punish him by depriving him of all trading privileges upon all "contract markets" "for such period as may be specified in said order," which may be permanently.

As speculating in grain and acting as agent for such speculators are recognized by the law to be lawful vocations, and as the right to pursue any lawful vocation—sometimes called "the liberty of pursuit"—is a part of the liberty which the Constitution guarantees to every citizen, it follows that the punishment here authorized is a deprivation of liberty within the meaning of that term in the due process clause.

Considering the offense created by, and the punishment provided therefor in, § 6, a trial by this commission appointed by the President, is not "due process of law." *Ex parte Milligan*, 4 Wall. 2; *Wong Wing v. United States*, 163 U. S. 228; *Huber v. Reily*, 53 Pa. St. 112; *Ex*

parte Randolph, Fed. Cas. No. 11,558; *Ong Chang Wing v. United States*, 218 U. S. 272; *Kilbourn v. Thompson*, 103 U. S. 168; *State v. Ryan*, 70 Wis. 676; *Parsons v. Russell*, 11 Mich. 113; *Addison v. State*, 126 Pac. 840; *Bessette v. Conkey Co.*, 194 U. S. 324.

Within authoritative definitions, attempts to manipulate, or other violation of the Grain Futures Act, clearly constitute crimes, which are punished solely in the interest of the general public. By depriving the violator of a part of his liberty it penalizes him for a wrong done to the public.

In this particular it is no less a criminal statute because, instead of compelling the wrong-doer to pay a money penalty or sending him to jail, it deprives him of his constitutional right to earn a living by trading on an exchange.

Section 6 authorizes the commission to punish one "violating any of the provisions of the act." Section 9 of the act declares a like violation a misdemeanor and punishable by a fine not exceeding \$10,000, or imprisonment not exceeding a year, or both. Section 9 contemplates a conviction in a criminal prosecution in the District Court. If violating any of the provisions of the act is a crime under § 9 it cannot be less so under § 6. By declaring in one section that the forbidden act is a misdemeanor and not doing so in another section, Congress cannot make the same act at once a crime and not a crime within the Constitution. *Schick v. United States*, 195 U. S. 65; *Passavant v. United States*, 148 U. S. 214; *Origet v. Hedden*, 155 U. S. 228; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320; *Callan v. Wilson*, 127 U. S. 540; *Murray v. Hoboken Co.*, 18 How. 277; *United States v. Cohen Grocery Co.*, 255 U. S. 81.

Section 6 also violates the Constitution in not being confined to such attempts to manipulate as prejudicially affect interstate commerce. *Trade-Mark Cases*, 100 U. S. 82.

It is hardly conceivable that the Constitution, in conferring interstate commerce power on Congress, intended to authorize it to exact licenses from every person engaged in making intrastate contracts for future delivery and make them revocable by an executive officer as a means of preventing some from obstructing interstate commerce.

It is therefore submitted that § 6 of the act, so far as it confers on this commission jurisdiction to try persons for overtrading, and to punish them by depriving them of the right to resort to the exchanges, is unconstitutional.

This question directly arises on this appeal; for the suit is not merely one by the Board of Trade, but also by seven members of the Board (suing on behalf of all of them) to restrain a public official (the Secretary of Agriculture) from enforcing, as prosecutor, what is a criminal provision—it being, as the bill alleges, his purpose to enforce it.

Mr. Solicitor General Beck, with whom *Mr. Blackburn Esterline*, Assistant to the Solicitor General, *Mr. R. W. Williams* and *Mr. Fred Ees* were on the brief, for appellees.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

Appellants contend that the decision of this Court in *Hill v. Wallace*, 259 U. S. 44, is conclusive against the constitutionality of the Grain Futures Act. Indeed in their bill they pleaded the judgment in that case as *res judicata* in this, as to its invalidity. The act whose constitutionality was in question in *Hill v. Wallace* was the Future Trading Act (c. 86, 42 Stat. 187). It was an effort by Congress, through taxing at a prohibitive rate sales of grain for future delivery, to regulate such sales on boards of trade by exempting them from the tax if they would comply with the congressional regulations. It was

held that sales for future delivery where the parties were present in Chicago, to be settled by offsetting purchases or by delivery, to take place there, were not interstate commerce and that Congress could not use its taxing power in this indirect way to regulate business not within federal control. We said (p. 68):

"Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."

Again, on page 69, we said:

"It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."

The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held in the somewhat carefully framed language of the foregoing quotations prevented our sustaining the Future Trading Act. As we have seen in the statement of the case, the act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce. Instead,

therefore, of being an authority against the validity of the Grain Futures Act, it is an authority in its favor.

The Chicago Board of Trade is the greatest grain market in the world. *Chicago Board of Trade v. United States*, 246 U. S. 231, 235. Its report for 1922 shows that on that market in that year were made cash sales for some three hundred and fifty millions of bushels of grain, most of which was shipped from States west and north of Illinois into Chicago, and was either stored temporarily in Chicago or was retained in cars and after sale was shipped in large part to eastern States and foreign countries. This great annual flow is made up of the cash grain sold on the exchange, the cash sales to arrive (*Chicago Board of Trade v. United States*, 246 U. S. 231), and the comparatively small percentage of grain contracted to be sold in the futures market not settled by offsetting. *Chicago Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 248. The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from western States bills of lading through Chicago to points in eastern States with the right to remove the grain at Chicago for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate. *Bacon v. Illinois*, 227 U. S. 504. Such a contract does not prevent the local taxing of the grain while in Chicago; but it does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it, as is plainly intimated in the authority cited (p. 516) and expressly recognized in *Stafford v. Wallace*, 258 U. S. 495, 525, 526. The fact that the grain shipped from the west and taken from the cars may have been stored in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for con-

tinuing the shipment, does not take away from the interstate character of the through shipment any more than a mixture of the oil or gas in the pipe lines of the oil and gas companies in West Virginia, with the right in the owners to withdraw their shares before crossing state lines, prevented the great bulk of the oil and gas which did thereafter cross state lines from being a stream or current of interstate commerce. *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, 272; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 281.

It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts, from the current of stock shipments declared to be interstate commerce in *Stafford v. Wallace*, 258 U. S. 495. That case presented the question whether sales and purchases of cattle made in Chicago at the stockyards by commission men and dealers and traders under the rules of the stockyards corporation could be brought by Congress under the supervision of the Secretary of Agriculture to prevent abuses of the commission men and dealers in exorbitant charges and other ways, and in their relations with packers prone to monopolize trade and depress and increase prices thereby. It was held that this could be done even though the sales and purchases by commission men and by dealers were in and of themselves intrastate commerce, the parties to sales and purchases and the cattle all being at the time within the city of Chicago.

We said (pp. 515, 516):

"The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows,

and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the live stock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."

This case was but the necessary consequence of the conclusions reached in the case of *Swift & Co. v. United States*, 196 U. S. 375. That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The *Swift Case* merely fitted the commerce clause to the real and practical essence of modern business growth. It applies to the case before us just as it did in *Stafford v. Wallace*.

The distinction that the exchange of the Chicago Board of Trade building is not within the same enclosure as the

railroad yards and warehouses in which the grain is received and stored on its way from the West to the East as it is being sold on the exchange, while the stockyards exchange and the actual receipt and shipment of cattle are within the same fence, surely can make no difference in the application of the principle. The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe, as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East.

The question under this act is somewhat different in form and detail from that in the *Stafford Case*, but the result must be the same. It is not the sales and deliveries of the actual grain which are the chief subject of the supervision of federal agency by Congress in the Grain Futures Act although a record of cash sales is required and a corner in cash sales would be a violation of it, and there are other provisions equally regulatory of them. It is the contracts of sales of grain for future delivery, most of which do not result in actual delivery but are settled by offsetting them with other contracts of the same kind, or by what is called "ringing." *Chicago Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 246-247. The question is whether the conduct of such sales is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain? And further, are they such an incident of that commerce and so intermingled with it that the burden and obstruction caused therein by them can be said to be direct?

In *United States v. Ferger*, 250 U. S. 199, the question was of the validity of a statute of Congress punishing the forging of bills of lading used in interstate commerce, and altering them. The lower court had dismissed an indictment charging the offense denounced in the statute,

on the ground that Congress could only deal with real bills of lading where there was an actual shipment in interstate commerce and had no power to punish a fraud and fiction where there was no such commerce, and where the bills of lading whose fabrication was the subject of complaint were mere pieces of paper fraudulently inscribed, and did not relate to any actual interstate commerce. This Court, speaking through Chief Justice White, rejected the view of the lower court, on the ground that interstate commerce would be directly impaired and weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently connected with such commerce. The Court, in *Stafford v. Wallace, supra*, adopted and applied this principle and said, 258 U. S. 521:

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.

It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding

of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse.

But it is contended that it is too remote in its effect on interstate commerce, and that it is not like the direct additions to the cost of the producer of marketing cattle by exorbitant charges and discrimination of commission men and dealers, as in *Stafford v. Wallace*. It is said there is no relation between prices on the futures market and in the cash sales. This is hardly consistent with the affidavits the plaintiffs present from the leading economists, already referred to, who say that dealing in futures stabilizes cash prices. It is true that the curves of prices in the futures and in the cash sales are not parallel and that sometimes one is higher and sometimes the other. This is to be expected because futures prices are dependent normally on judgment of the parties as to the future, and the cash prices depend on present conditions, but it is very reasonable to suppose that the one influences the other as the time of actual delivery of the futures approaches, when the prospect of heavy actual transactions at a certain fixed price must have a direct effect upon the cash prices in unfettered sales. The effect of such a "deal" as that of May, 1922, as explained by Mr. J. H. Barnes, shows this clearly and illustrates in a striking way the direct effect of such manipulation in disturbing the actual normal flow of grain in interstate commerce most injuriously. Mr. Barnes also points out the effect of the operation of the rule limiting deliveries to warehouse receipts from warehouses selected by the directors of the Board whose unregulated power to suspend or modify the rule pending settlement, adds to the speculative character of the market and frightens consignors.

More than this, prices of grain futures are those upon which an owner and intending seller of cash grain is influenced to sell or not to sell as they offer a good opportunity to him to hedge comfortably against future fluctuations. Manipulations of grain futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only this justifiable hedging but disturb the normal flow of actual consignments. A futures market lends itself to such manipulation much more readily than a cash market.

In the case of *United States v. Patten*, 226 U. S. 525, an indictment charged a conspiracy to run a corner by making purchases of quantities of cotton for future delivery, by means of which the conspirators were to secure control of the available supply of cotton in the country and enhance the price of cotton at will. It was contended that even if the necessary result of this was an obstruction of interstate trade, it was so indirect as not to constitute a restraint of it within the Federal Anti-Trust Law under which the indictment was drawn. This Court held otherwise and sustained the indictment.

Corners in grain through trading in futures have not been so frequent as they were before 1900, due, as the plaintiffs aver, to the stricter rules of the Board of Trade as to futures and to the Sherman Anti-Trust Act, though they do seem to have since occurred infrequently. The fact that a corner in grain is brought about by trading in futures shows the direct relation between cash prices and actual commerce on the one hand, and dealing in futures on the other, because a corner is not a monopoly of contracts only, it is a monopoly of the actual supply of grain in commerce. It was this direct relation that led to the decision in the *Patten Case*. If a corner and the enhance-

ment of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided.

The next provision of the act which is attacked as invalid is that which forbids a board, designated as a contract market, from excluding from membership in, and all privileges on, its exchanges any duly authorized representative of a lawfully formed and conducted association of producers having adequate financial responsibility, engaged in the cash grain business, and complying or agreeing to comply with the terms and conditions lawfully imposed on the other members, and which bars any rule forbidding the return by such association of the commissions of its representative, less expenses, to the *bona fide* members of the coöperative association in proportion to their consignments of grain to the exchange. It is said that this will impair the value of membership in the Board and will take the property of the members without due process of law.

The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to

reasonable regulation in the public interest. The Supreme Court of Illinois has so decided in respect to its publication of market quotations. *New York & Chicago Grain Exchange v. Chicago Board of Trade*, 127 Ill. 153. In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales of futures upon interstate commerce, we find no difficulty under *Munn v. Illinois*, 94 U. S. 113, 133, and *Stafford v. Wallace*, *supra*, in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest and is subject to national regulation as such. Congress may, therefore, reasonably limit the rules governing its conduct with a view to preventing abuses and securing freedom from undue discrimination in its operations. The incidental effect which such reasonable rules may have, if any, in lowering the value of memberships does not constitute a taking, but is only a reasonable regulation in the exercise of the police power of the National Government. Congress evidently deems it helpful in the preservation of the vital function which such a board of trade exercises in interstate commerce in grain that producers and shippers should be given an opportunity to take part in the transactions in this world market through a chosen representative. Nor do we see why the requirement that the relation between them and this representative, looking to economy of participation on their part by a return of patronage dividends, should not be permissible because facilitating closer participation by the great body of producers in transactions of the Board which are of vital importance to them. It would seem to make for more careful supervision of those transactions in the national public interest in the free flow of interstate commerce. Under the present rules of the Board, corporations are permitted to enjoy the benefit of membership by reason of the membership of two of their executive officers who are *bona fide* stockholders, and all their stock-

holders are thus given a chance to enjoy the commissions earned and the benefits to the corporation of other membership privileges to the extent of their stock ownership. The provisions of the act objected to are to be sustained on the principles laid down in *House v. Mayes*, 219 U. S. 270; *Brodnax v. Missouri*, 219 U. S. 285, and *Grisim v. South St. Paul Live Stock Exchange*, 152 Minn. 271. We think the objection to this feature of the act untenable.

We do not find it necessary to our decree in this case to consider the constitutional objections made in the bill to that part of the fourth section which forbids the use of the mails and interstate facilities of communication to offer or accept sales for future deliveries or to send quotations of prices thereof except through members of a board of trade, because the plaintiffs are not affected thereby. Section 10 of the act reads as follows:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."

The unconstitutionality of these provisions, if they be unconstitutional, would, therefore, not invalidate the rest of the act.

Section 9 declares it to be a misdemeanor for a member of a designated board of trade to fail to evidence any contract mentioned in § 4 by a record in writing as therein required. This is only a legitimate means of enforcing the statutory regulations of the Board of Trade which we have found to be within the power of Congress.

As to the power of Congress to provide in § 9 for the punishment of any one who shall knowingly or carelessly deliver through the mail or interstate means of communication false or misleading crop or market reports, it will be time enough for us to consider its existence when some one is charged with the offense and is brought to trial therefor. The plaintiffs present no such case.

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Syllabus.

Paragraph (b) of § 6 which gives to the Commission the power, on complaint after investigation by the Secretary of Agriculture, and after a hearing, to exclude from all contract markets any person violating any of the provisions of the act or attempting to manipulate the market price of any grain in violation of the provisions of § 5 of the act or of any of the rules or regulations made in pursuance to its requirements, is attacked as invalid because a jury trial is not afforded. The plaintiffs do not aver that they are committing acts which will subject them to such exclusion, or that charges have been made and proceedings have been begun or are about to be begun against them by the Secretary of Agriculture. Until they are thus in danger of suffering prejudice from the operation of the paragraph, they can not invoke our decision as to its validity.

For the reasons given the decree of the District Court is

Affirmed.

MR. JUSTICE McREYNOLDS and MR. JUSTICE SUTHERLAND dissent.

PRENDERGAST ET AL. v. N. Y. TEL. CO.